Supreme Court, U.S.
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No. 10-10-763

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In The
Supreme Court of the United States

TANYA JACKSON, *et al.*,

Petitioners,

v.

ESTELLE'S PLACE, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 216(b) of the Fair Labor Standards Act requires a court to award "a reasonable attorney's fee" to a prevailing plaintiff. The question presented is: in an action under the Fair Labor Standards Act in which the individual plaintiffs recover the monetary relief authorized by the Act, may the counsel fee awarded to prevailing plaintiffs nonetheless be reduced because (1) the FLSA claims and relief were "modest" in size, or (2) the relief obtained did not include other remedies or related claims asserted in the complaint?

PARTIES

The petitioners are Tanya Jackson, Michael Agyeman, Thomas George, Isaac Asare, Sharon Doss and Courtney Collins.

The respondents are Estelle's Place, LLC, Jireh Place, LLC, Our Place, LLC, Destiny Place, LLC, Debra Roundtree and Mary Bell.

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Petitioners Tanya Jackson, et al., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 12, 2010.

OPINIONS BELOW

The August 12, 2010, opinion of the Court of Appeals, which is unofficially reported at 2010 WL 3190697 and 16 Wage & Hour Cas. 2d (BNA) 962 (4th Cir.2010), is set out at pp. 1a-27a of the Appendix. The September 7, 2010 order of the Court of Appeals, denying rehearing and rehearing en banc, is not reported, and is set out at pp. 47a-48a of the Appendix. The June 9, 2009 order of the District Court, which is not officially reported, is set out at pp. 28a-33a of the Appendix. The May 8, 2009 Memorandum Opinion of the District Court, which is not officially reported, is set out at pp. 34a-36a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on August 12, 2010. A timely petition for rehearing and rehearing en banc was denied on September 7, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is set out in the Appendix.

STATEMENT OF THE CASE

For years the lower courts have wrestled with questions about whether (and if so, how) they should consider the size of the monetary relief recovered by the plaintiff when determining the amount of a court-awarded counsel fee. That task has been complicated by the absence of any majority opinion in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and by evolution in this Court's view of the permissibility of departures from the lodestar fee calculated on the basis of hours and applicable hourly rates. This case presents the two major conflicts that exist among the lower courts about this issue, and provides an excellent vehicle for resolving them.

The plaintiffs in this case are current and former employees of several related entities that operate group homes for the developmentally disabled. The plaintiffs claimed that they had improperly been denied payment for overtime at the time-and-a-half rate required by the Fair Labor Standards Act. The plaintiffs typically worked at several of the homes in a given week, and received separate checks (at straight time rates) from each home. When the total number of hours worked for the various homes exceeded 40 hours in a week, the plaintiffs were not paid at overtime rate for hours in excess of forty.

Although the group homes were nominally operated by separate corporations, they were owned and operated by the same person. The plaintiffs therefore alleged that the corporations were joint employers under the FLSA. If all of the homes should have been treated as a single employer, the plaintiffs would have been entitled under the FLSA to wages at overtime rates.

The plaintiffs filed a complaint in federal district court asserting a claim under the FLSA. The complaint alleged that the four group homes were joint employers subject to the FLSA, and that the denial of pay at overtime rates therefore violated that Act. Plaintiffs' complaint sought the remedies available to private plaintiffs under the FLSA, payment of the additional half-time for overtime, a doubling of that wage award on the ground that the violation of the FLSA was not in good faith, and counsel fees.

The complaint also included two alternative state law grounds for relief, a contract claim and a claim in quantum meruit. These state law claims were based on the same factual allegations as the FLSA; the state law claims incorporated by reference the factual allegations underlying the FLSA claim itself. The state law claims set forth alternative legal theories under which the plaintiffs might recover if the FLSA were determined to be inapplicable to the defendants. The complaint also requested the types of remedies that, although not available under the FLSA, might be awarded under the state law claims, such as damages, punitive damages, and injunctive relief.

The complaint was filed in September 2008. Plaintiffs' counsel propounded a number of discovery requests related to whether the group homes should be treated as a joint employer. Plaintiffs also filed a motion asking that notice of the pendency of the action be provided to all similarly situated employees of the group homes and that defendants be ordered to provide a list of those workers. The motion was granted on December 19, 2008; four days later the parties agreed on a settlement.

The settlement provided that the plaintiffs would be paid additional wages equal to unpaid overtime compensation (i.e., half-time) for all hours or fractions thereof worked in excess of 40 hours during any one work week during the relevant period of time, plus an equal amount in liquidated damages. This settlement provided to the six plaintiffs all of the monetary relief available to them under the FLSA. The monetary awards to the six plaintiffs totaled $19,954.34. (Pet. App. 49a). Although the complaint had asked that the action proceed as a collective action under FLSA, and as a class action (under the state law claims), the settlement ended the litigation by mooting the claims of all the named plaintiffs.

The settlement provided that the plaintiffs were entitled to a reasonable attorneys' fee to be determined by the district court. In response to plaintiffs' motion for a fee award, the district judge determined that the hours "reasonably expended" in the litigation totaled 214.7 hours. (Pet. App. 43a). The judge also determined "the prevailing market [hourly] rates in

Northern Virginia" for each of the attorneys and assistants who had represented the plaintiffs. (Pet. App. 37a-40a). (That determination of hours and prevailing market rates is not in dispute). The fee calculation based on the hours and hourly rates approved by the court was $48,800. The judge explained that "[i]t is unnecessary to subtract fees incurred for unsuccessful, unrelated claims ... because plaintiff settled all of their claims for full value." (Pet. App. 45a).

Defendants nonetheless urged the district court to reduce the fee awarded, objecting that "[t]he full amount of the settlement for all six Plaintiffs will be a mere fraction of the attorneys' fees sought by Plaintiffs."[1] Applying Fourth Circuit precedent, the district judge concluded she was required to reduce the counsel fee award to $36,000 in light of "the amount in controversy and the results obtained." (Pet. App. 43a) (quoting *Barber v. Kimbrell's Inc.*, 577 F.3d 216, 226 n.28 (4th Cir.1978)).

> "'[T]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" ... In the end, only six plaintiffs joined this lawsuit and their total recovery was less than $10,000 before being doubled under the liquidated damage provision of the FLSA. Moreover, of

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[1] Defendants' Memorandum of Points and Authorities In Response to Plaintiffs' Petition for Award of Attorneys' Fees and Costs, 19-20.

> the six awards, four were for less than $1,000 before being doubled under the liquidated damage provision of the FLSA. Moreover, of the six awards, four were for less than $1,000 before doubling.... *An attorneys' fee should bear some reasonable relationship to the recovery of plaintiffs*. Given the *modest value* of the plaintiffs' claims, the Court will further reduce to the lodestar figure by approximately 25% percent to $36,000.00.

(Pet. App. 43a) (emphasis added) (quoting *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)).

The plaintiffs filed a motion to alter or amend this order, challenging the 25% reduction. The district judge issued a second opinion, reiterating that the reduction had been imposed because of the "modest" size of the plaintiffs' FLSA claims and recovery. (Pet. App. 32a). The district judge also noted that although the settlement provided all the overtime compensation and liquidated damages the plaintiffs had sought under the FLSA, the settlement did not provide "any of the other forms of relief they sought in the complaint." (Pet. App. 32a).

On appeal a divided panel upheld the disputed reduction in the counsel fee. It recognized that "the traditional lodestar amount in this case (hours x appropriate hourly rate) was $47,800." (Pet. App. 8a). But the court of appeals concluded that under Fourth Circuit precedent the 25% reduction was proper because the district judge was required to consider "the amount in controversy and the results obtained." (Pet. App. 10a) (quoting *Kimbrell's*).

The panel majority held that it was permissible for the district judge to reduce the counsel fee award on the ground that the fee "should bear some reasonable relationship to the recovery of plaintiffs." (Pet. App. 6a). Such a reduction, the majority held, was authorized by this Court's decision in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). "As the district court stated, ... *City of Riverside* did not impose a blanket prohibition on the use of the rule of proportionality." (Pet. App. 13a). It was thus proper for the district court to reduce the fee award based at least in part on "a proportionality approach." (Pet. App. 13a).

The panel majority also held that it was proper to reduce the counsel fee because the settlement, although providing all the monetary relief authorized by the FLSA for the six plaintiffs, did not include any relief under the state law claims that had been included in the complaint.

> [T]he district court ... was cognizant of the broad scope of the case as Appellants filed it, ... including the presence of state law claims (which were not "successfully" prosecuted) and the request for broad relief, compared to the more modest result achieved.

(Pet. App. 11a). The panel explained that a reduction in the fee awarded under the FLSA was correct because under the settlement "no relief was awarded on any state law claim." (Pet. App. 5a).

Judge Gregory dissented. With regard to the total size of the settlement, he pointed out that the

plaintiffs had obtained all the relief authorized by the FLSA. "The employees negotiated a settlement that provided them with the maximum monetary relief due under the FLSA – the full amount of overtime pay owed plus an equal amount of liquidated damages." (Pet. App. 19a). The settlement was "modest" only because, and in the sense that, the underlying FLSA claims asserted were also modest. "[T]he district court's focus on the damages awarded *as compared to the attorneys' fee* ... constitutes error." (Pet. App. 17a). The action of the district judge in reducing the counsel fee because it was larger than the monetary settlement, Judge Gregory pointed out, "has been soundly rejected by other courts," noting that reductions on that basis had been expressly disapproved by decisions in the Second, Sixth and Eighth Circuits. (Pet. App. 23a).

The dissent also argued that it was improper to reduce the fee award under the FLSA because the settlement did not include additional relief under the *state* law claims that had been alleged in the complaint. Such state law claims, Judge Gregory noted, were at least often preempted in a case to which the FLSA itself applied. (Pet. App. 22a).[2]

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[2] See *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191-95 (4th Cir.2007) (FLSA preempts state contract claims arising from the same course of action).

REASONS FOR GRANTING THE WRIT

More than a hundred federal statutes authorize or mandate awards of counsel fees to prevailing plaintiffs. For several decades, in a series of decisions regarding the standard for determining the size of fee awards under these provisions, this Court has worked to fashion a standard sufficiently objective that its application would be both predictable and subject to meaningful appellate review. Those decisions have increasingly stressed that the fee determination should ordinarily be limited to multiplying the hours reasonably expended by the hourly rate appropriate for the attorneys involved, the lodestar fee. *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010).

Despite the salutary purpose of those decisions, litigation about the size of fee awards remains rampant. Much of the lower court litigation concerns disagreements about whether, and if so when, the amount of substantive relief recovered by a successful plaintiff provides a basis for reducing the lodestar fee. Those differences among the courts of appeals concern two distinct questions: (1) whether a fee can be reduced because a lodestar is larger than the monetary relief recovered, and (2) whether a fee can be reduced because the relief obtained by the plaintiff is smaller or narrower than the relief sought in the original complaint. Often, as in the instant case, both of those issues arise regarding a single fee application.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT CIRCUIT CONFLICT REGARDING WHETHER A COUNSEL FEE MAY BE REDUCED BECAUSE IT IS LARGER THAN THE MONETARY RELIEF OBTAINED BY THE PLAINTIFF

The first question presented concerns whether, in determining the size of a counsel fee award, a court may award a reduced fee because the fee requested is larger than the amount of monetary relief obtained by the plaintiff. A sharp circuit conflict now exists among the courts of appeals about this issue. Four circuits, including in this case the Fourth Circuit, have held that the difference between the fee request and the monetary relief is a permissible basis for reducing a fee award. Four other circuits hold, to the contrary, that a trial judge may not reduce a fee award on the ground that the fee requested is larger than the monetary relief obtained by the plaintiff.

(1) In the instant case the Fourth Circuit held that it was permissible for the trial judge to reduce the fee requested in order to assure that the fee would "bear some reasonable relationship to the recovery of the plaintiffs." (Pet. App. 6a). A "rule of proportionality," the court of appeals held, was in at least some circumstances (including the instant case) permitted by *City of Riverside*. (Pet. App. 13a). The decision below is consistent with a series of earlier Fourth Circuit decisions upholding the reduction of a counsel fee on the ground that the fee requested

would be disproportionate to the monetary relief obtained by the plaintiff. "A court should examine 'the size of the proposed attorney's fee ... award in comparison with the total damage award.'" *McDonnell v. Miller Oil Co., Inc.*, 134 F.3d 638, 641 (4th Cir.1998) (quoting *Thomas v. Peacock*, 39 F.3d 493, 506 (4th Cir.1994)); *Thomas v. Peacock*, 39 F.3d at 506 (overturning fee award as excessive because trial judge had failed to consider "the size of the proposed attorneys' fee ... in comparison with the total damage award."); see *Van Sant v. United States Postal Service*, 805 F.2d 141, 143 (4th Cir.1986) ("the gross disproportionality between Van Sant's recovery and the fee requested is a factor we consider").

In the Fifth Circuit it has long been the rule that "proportionality is an appropriate consideration in the typical case." *Hernandez v. Hill Country Telephone Cooperative, Inc.*, 840 F.2d 139, 144 (5th Cir.1988). In *Saizan v. Delta Concrete Products Co., Inc.*, 448 F.3d 795 (5th Cir.2006), the court of appeals quoted *Hernandez* in approving the decision of a trial judge to slash a lodestar of approximately $114,000 to a mere $13,000, emphasizing that the plaintiffs had settled their claim for $20,000. 448 F.3d at 801-03 and n.42. In *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 395 (5th Cir.2003), the Fifth Circuit, again quoting *Hernandez*, directed the trial judge to reconsider the fee he had awarded because the appellate court had reduced the amount of backpay to which the plaintiff was entitled. In *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041 (5th Cir.1998), the Fifth Circuit

reversed a counsel fee award because it substantially exceeded the damages that had been awarded to the plaintiff.

> The attorney's fee award was over six and one-half times the amount of damages awarded. Regardless of the effort and ability of [plaintiff's] lawyers, we conclude that th[is] ratio[ ] [is] simply too large to allow the fee award to stand. We hold that the district court abused its discretion by failing to give adequate consideration to the result obtained relative to the fee award.

135 F.3d at 1048.

In *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805 (9th Cir.1995), the Ninth Circuit, after reducing the monetary relief that had been won by the plaintiff, directed the trial judge to also reduce the fee award. The trial judge had explained that he would have awarded the same fee even in the absence of the disputed monetary relief; in so ruling, the Ninth Circuit held, the trial court had "abused its discretion."

> [N]o reasonable person would pay lawyers $148,000 to win $34,000.... The district court *must* reduce the attorneys fees award so that it is commensurate with the extent of the plaintiff's success.

51 F.3d at 810 (emphasis added);[3] see *J.R. ex rel. Dickson v. City of San Bernardino*, 374 Fed.Appx. 755, 757 (9th Cir.2010) (noting the "standard" in *McGinnis* barring "fees ... disproportionate to the results obtained"); *McCown v. City of Fontana*, 565 F.3d 1097, 1104 (9th Cir.2009) (applying holding in *McGinnis* that $148,000 fee was excessive for an award of $34,000).

The Federal Circuit has expressly approved of a reduction in the lodestar based on a comparison of "the amount of fees sought in relation to the compensatory award received." *Maxwell v. Angel-Etts of California, Inc.*, 53 Fed.Appx. 561, 568 (Fed. Cir.2002); see *Hubbard v. United States*, 480 F.3d 1327, 1333 (Fed. Cir.2007) (amount of fee "seems grossly excessive in light of the small recovery").

Four other circuits have emphatically held to the contrary that a fee award cannot be reduced on this basis. The Second Circuit has expressly prohibited trial courts from reducing fee awards on the ground that they are disproportionate to the relief obtained by the plaintiff. Counsel fee provisions are

> enacted in part to secure legal representation for plaintiffs whose ... injury was too small,

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[3] Although the claim in *McGinnis* arose under Washington state law, that state looked to federal law in determining counsel fees; the Ninth Circuit decision was based on its reading of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Farrar v. Hobby*, 506 U.S. 103 (1992). 51 F.3d at 808.

> in terms of expected monetary recovery, to create an incentive for attorneys to take the case under conventional fee arrangement.... Reasoning that a rule calling for proportionality between the fee and the monetary amount involved in the litigation would effectively prevent plaintiffs from obtaining counsel in cases where [the] deprivation ... caused injury of low monetary value, we have repeatedly rejected the notion that a fee may be reduced merely because the fee may be disproportionate to the financial interest at stake in the litigation.

Kassim v. City of Schenectady, 415 F.3d 246, 252 (2d Cir.2005) (error to reduce lodestar of $65,400 on ground that it was disproportionate to "a case involving a $2500 injury"). "A presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award." *Cowan v. Prudential Ins. Co. of America*, 935 F.2d 522, 526 (2d Cir.1991) (overturning district court decision that had reduced lodestar of $54,012 because it was larger than $15,000 in damages won by plaintiff).[4]

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[4] See *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426 (2d Cir.1999) (refusing to link size of fee "to the dollar value of [plaintiff's] claim," reasoning that "Congress enacted fee-shifting ... because the expected monetary recovery in many cases was too small to attract effective legal representation"); *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 98 (2d Cir.1997) ("reduction of a requested fee merely because the damages recovery is small is 'error unless the size of the award is the result of the quality of representation'") (quoting *DiFillippo*) (fee application

(Continued on following page)

The Third Circuit has repeatedly held that a trial court may not reduce a fee award because the requested fee is larger than the monetary relief obtained by the plaintiff. "When delinquencies are small, the cost of recovery may be disproportionate, and ... proportionality would, in effect, discourage pl[aintiffs] from taking their claims to court." *United Automobile Workers Local 259 v. Metro Auto Center*, 501 F.3d 283, 295 (3d Cir.2007) (upholding fee of $28,623.14 in case where plaintiff won $1,928.00). "[T]he district Court may not reduce a fee award simply because it exceeds the damages award." *Eichenlaub v. Township of Indiana*, 214 Fed.Appx. 218, 223 (3d Cir.2007) (upholding fee of $672,648.70 in case where plaintiff won $127,935). "[A] court may not diminish counsel fees in a section 1983 action to maintain some ratio between the fees and the damages awarded." *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1041 (3d Cir.1996) (district court could not reduce a fee request for $175,000 on the ground that the size of the fee was "nonsensical" in comparison to the $25,000 verdict).[5]

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of $37,020 could not be reduced because it was disproportionate to $10,500 in damages awarded to plaintiff); *Grant v. Martinez*, 973 F.2d 96, 101-02 (2d Cir.1992) (refusing to permit proportionality).

[5] 89 F.3d at 1042 ("We hold that the court's consideration of the proportionality of the damages to the fee award was legal error."); see *Davis v. Southeastern Pennsylvania Transp. Authority*, 924 F.2d 51, 55 (3d Cir.1991) (disapproving holding of district court that "[t]here is something wrong with spending

(Continued on following page)

The Seventh Circuit recently explained at length why a fee award should not be reduced on the ground that it is larger than the monetary relief obtained in a case.

> Fee-shifting provisions signal Congress' intent that violations of particular laws be punished, and not just large violations.... [S]imply stated, fee-shifting "helps to discourage petty tyranny." *Barrow v. Falck*, 977 F.2d 1100, 1103 (7th Cir.1992). Because Congress wants even small violations of certain laws to be checked through private litigation and because private litigation is expensive, it is no surprise that the cost to pursue a contested claim will often exceed the amount in controversy.

Anderson v. AB Painting and Sandblasting Inc., 578 F.3d 542, 545-46 (7th Cir.2009); see *Orth v. Wisconsin State Employees Union, Council 24*, 546 F.3d 868, 875 (7th Cir.2008) ("One purpose of allowing an award of attorneys' fees to a prevailing plaintiff is to disable defendants from inflicting with impunity small losses on the people whom they wrong.... Accomplishing that purpose will often require a fee award equal to or larger than the damages awarded."); *Barrow v. Falck*, 977 F.2d 1100, 1103 (7th Cir.1992) (if fees were

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$118,500 to receive a recovery of $10,000"); *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 472-75 (3d Cir.1989) (fee award cannot be reduced on the ground that it is disproportionate to amount of compensatory damages).

reduced because they were larger than the underlying claim "people can get away with small offenses").

The Eighth Circuit has "explicitly rejected a 'rule of proportionality' in civil rights cases because tying the attorney's fees to the amount awarded would discourage litigants with small amounts of damages from pursuing a civil rights claim in court." *Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 580 (8th Cir.2006). In *Thomas v. National Football League Players Ass'n*, 273 F.3d 1124 (D.C.Cir.2001), the District of Columbia Circuit relied on the plurality opinion in *City of Riverside* in holding that the fact that "the fees awarded are, as the district court acknowledged, 'nearly five times the amount of plaintiff's recovery,' ... does not make them excessive." 273 F.3d at 1129.

The lower courts have repeatedly noted the existence of these conflicting standards. "An examination of other circuits reveals differing approaches." *Cobb v. Miller*, 818 F.2d 1227, 1234 (5th Cir.1987).

> The Second, Fifth and Seventh circuits have addressed this issue, finding that a low damage award is not proper grounds for reducing a fee award.... These are more persuasive than the analysis of the Eleventh Circuit which approved of such a reduction.

Abdur-Rahman v. Pieron, 1991 WL 93099 at *3 (6th Cir. June 3, 1991) (Keith, J., dissenting). "The courts have divided over th[e] suggestion that generally only proportionate fees should be awarded." *Chaparral*

Texas, L.P. v. W. Dale Morris, Inc., 2008 WL 190433 at *12 n.5 (S.D.Tex. Jan. 22, 2008). In his dissenting opinion in the court below Judge Gregory correctly noted that the standard in the majority opinion, approving reduction of a fee if it is larger than the monetary recovery, "has been soundly rejected by other courts," citing decisions in the Second, Third and Sixth Circuits. (Pet. App. 23a).

(2) This circuit conflict derives in part from the absence of a majority opinion in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). See *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1041 (3d Cir.1996) (noting the "difficult task of sorting through *City of Riverside*'s muddled outcome").

In *City of Riverside* the plaintiffs had recovered $33,350 in compensatory damages. That award followed years of trial court litigation, and the district judge awarded $245,456.25 in counsel fees. On appeal the defendants argued that a counsel fee award should be reasonably proportionate to the amount of monetary relief obtained by the plaintiff. This Court rejected that contention and upheld the fee award, but could not agree on the applicable standard.

The plurality opinion reasoned that tying the size of a fee award to the amount of monetary relief would defeat the purpose of the fee-shifting provision in cases where underlying monetary claims were small.

> A rule of proportionality would make it difficult, if not impossible, for individuals with

> meritorious ... claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose....

477 U.S. at 578. Reducing a few award because the plaintiff's claim, and resulting recovery, were small, the plurality reasoned, would be contrary to "Congress['s] determin[ation] that it would be necessary to compensate lawyers for *all* time reasonably expended on a case." *Id.* (emphasis added).

But Justice Powell, who provided the fifth vote for affirmance, concurred only in the judgment. He concluded that proportionality was not mandatory, and that the district judge thus had not abused his discretion in making the disputed fee award. But Justice Powell's opinion (unlike the plurality) did not address whether proportionality was an impermissible consideration in determining the amount of a court-awarded fee.

In the wake of the inconclusive result in *City of Riverside*, the courts of appeals have differed regarding what significance to attach to Justice Powell's concurring opinion,[6] and have reached conflicting

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[6] See, e.g. *United Automobile Workers, Local 259 v. Metro Auto Center*, 501 F.3d 283, 292-93 (3d Cir.2007) (contrasting plurality opinion with concurring opinion of Justice Powell); *Northeast Women's Center v. McMonagle*, 471-73 (3d Cir.1989) (contrasting plurality opinion with concurring opinion and "enigmatic footnote" of Justice Powell).

conclusions as to whether a fee award may be reduced because the requested fee is greater than the underlying monetary relief.

(3) The decision of the Fourth Circuit in this case, like the practice in other circuits of reducing lodestar fees because they are larger than the monetary relief awarded, strikes at the heart of federal fee-shifting statutes. The very purpose of these laws is to enable plaintiffs to obtain the assistance of competent counsel in cases in which the violation at issue caused damages too small to permit the victim to obtain counsel on a contingent fee basis. Permitting reduction of fees on the ground when they exceed the monetary recovery obtained will seriously impede the availability of counsel to represent plaintiffs with meritorious but modest claims.

Use of a proportionality factor would be particularly harmful to claims under the Fair Labor Standards Act. Most claims under the Fair Labor Standards Act are relatively small. Highly paid workers are not generally subject to the FLSA. Insofar as the FLSA guarantees a *minimum* wage, individual claims will almost by definition be modest. In fiscal year 2008 the average back wages collected by the Department of Labor under the FLSA was $712. The average back wages collected by federal officials for unlawfully withheld overtime, the type of

violation in this case, was $579.[7] In the instant case, the six plaintiffs obtained awards averaging $3,326; that was several times higher than the average award collected by the Department of Labor, but still "modest" in the eyes of the district judge.

The lower courts have repeatedly recognized that consideration of proportionality would obstruct private enforcement of the FLSA.

> Recoveries in individual FLSA cases ... typically are modest; they involve cases in which a law-flouting employer has, in essence, tried to nickel-and-dime his employee. With that backdrop, limiting recoverable fees when a plaintiff recovers relatively modest damages in a FLSA case would create a significant disincentive for lawyers to take on such litigation, which, in turn, would undermine Congress' intent in creating the statute and authorizing private enforcement actions.

Urnikis-Negro v. American Family Property Services, Inc., 2009 WL 212122 at *4 (N.D.Ill. Jan. 26, 2009). "If the rule were otherwise, then attorneys might not be willing to accept cases involving small monetary claims even though such claims implicate the important policies underlying the FLSA." *Posner v. The Showroom, Inc.*, 1985 WL 13108 at *2 (6th Cir. March 3, 1985).

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[7] http://www/doc.gov/whd/statistics/2008fiscalyear.htm (Visited October 14, 2010).

The harmful impact on FLSA cases would be particularly severe because prospective attorneys would usually know in advance that the monetary relief would be modest in size. In other types of cases, where a large recovery is at least possible, a plaintiff may be able to find and retain an attorney who hopes that the ultimate recovery will be large enough to avoid a fee reduction based on disproportionality. But the amount of wages owed in an individual FLSA case will usually be apparent from the outset, as will the likelihood in most cases that the plaintiff is certain to win no more than a "modest" – and fee threatening – monetary award.

The Fourth Circuit decision in the instant case has forcefully called to the attention of attorneys in that circuit the imprudence of agreeing to represent individual plaintiffs in FLSA cases. Sensible attorneys would avoid the large majority of individual FLSA cases in which monetary awards will be sufficiently modest that the fee awards could be reduced substantially. It is little comfort that such reductions are merely permissive in the Fourth Circuit. Although in the instant case the fee reduction approved by the court of appeals was 25%, the reduction could of course be larger in future cases. Simple prudence will dictate that lawyers in the Fourth Circuit avoid such risks by declining to represent clients with small individual FLSA claims.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT CIRCUIT CONFLICT REGARDING WHEN THE AMOUNT OF A COUNSEL FEE MAY BE ADJUSTED BASED ON THE DEGREE OF SUCCESS OF THE PLAINTIFF

The second question presented concerns when a fee request should be reduced based on the degree of success achieved in the litigation. All courts agree that where a complaint has several *un*related claims, a plaintiff who has prevailed on one claim cannot obtain fees for hours devoted to a separate unsuccessful unrelated claim. In that situation the hours spent on the unrelated unsuccessful claims simply will not be included in the lodestar calculation. The circuits are divided, however, regarding two other recurring problems: first, whether a fee may (or must) be reduced because the successful plaintiff did not obtain all the relief sought in his or her complaint, and second, whether a fee may (or must) be reduced because a successful plaintiff asserted several related claims arising out of a single course of action, but did not prevail on all of those claims.

(1) The courts of appeals are divided regarding whether, in determining the amount of a counsel fee, a court should compare the relief obtained by the plaintiff with the relief sought in the original complaint. Several circuits, including the Fourth Circuit, insist that such a comparison is mandatory, and that the counsel fee must be reduced if the plaintiff won less than he or she sought. Other circuits reject

use of this type of comparison in making a fee determination.

In the instant case the individual plaintiffs obtained all the monetary relief that was claimed under the FLSA itself. But the court of appeals believed that a reduction in the fee award was proper when "the request for broad relief [in the complaint was] compared to the more modest result achieved." (Pet. App. 11a). Earlier Fourth Circuit decisions made clear that this sort of comparison, and fee reduction, is mandatory in that circuit. "We do consider the extent of the relief obtained by the plaintiff to be particularly important when calculating reasonable fees, and *Barber requires* district courts to weigh the amount in controversy and the results obtained before deciding upon a reasonable fee." *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 189 (4th Cir.2007) (emphasis added). "The *Barber* requirement rests on the idea that a prevailing plaintiff is less worthy of a fee award ... when he cannot demonstrate that he deserves the compensation he demanded in his complaint." *Id.* at 189-90. Thus in *Dotson v. Pfizer, Inc.*, 558 F.3d 284 (4th Cir.2009), the Fourth Circuit held that it was proper to reduce the lodestar fee by 30% because the plaintiff who had won a $666,610 award had unsuccessfully sought a larger sum at trial. 558 F.3d at 303-04.

The Ninth Circuit too has repeatedly held that the lodestar should be reduced if the monetary relief awarded is significantly smaller than what was sought in the complaint. In *McCown v. City of Fontana*,

565 F.3d 1097 (9th Cir.2009), the plaintiff recovered $20,000 in damages, which was smaller than the "damages in excess of $75,000" asserted in his complaint. The Ninth Circuit reversed the trial judge's decision awarding the lodestar, holding that that difference required a substantial reduction in the lodestar.

> McCown's victory clearly fell short of his goal; therefore, it is unreasonable to grant his attorneys more than a comparable portion of the fees and costs they requested.

565 F.3d at 1104-05. Citing Justice Powell's concurring opinion in *City of Riverside*, the Ninth Circuit asserted that *City of Riverside* had "suggested that a comparison of damages awarded to damages sought *is required*." 565 F.3d at 1104 (emphasis added). See *Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir.1994) (50% reduction proper in police misconduct case in which jury awarded $25,000, but complaint had sought $5 million).

The Eleventh Circuit also has repeatedly held that a counsel fee may be reduced on the ground that the relief won by the plaintiff was smaller than what was requested in the complaint. In *Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir.1987), the Eleventh Circuit approved a 67% reduction in the loadstar because the plaintiff, who had won $30,000 in compensatory damages, had sought $2 million in damages in his complaint. "[T]he relief a plaintiff requested is indeed relevant to determining the extent of that plaintiff's success.... [I]n determining a plaintiff's

degree of success, courts have compared the relief requested against the relief ultimately obtained." 820 F.2d at 1581; see *Andrews v. United States*, 122 F.3d 1367, 1375-76 (11th Cir.1997) (mandating reduction in lodestar because damage award of $49,549 was lower than damages sought).

Several circuits, on the other hand, have disapproved reducing counsel fees on this basis. The Sixth Circuit has held that a counsel fee cannot be reduced because the amount of monetary relief awarded is smaller than what was sought in the complaint.

> [T]he fact that Hamlin sued for more than $1,000,000, but the jury awarded only $500, is not a proper basis for reducing the fee request. The law does not require plaintiffs to recover 100% of what they sue for in order to be considered successful at trial. Otherwise, virtually no plaintiff would ever recover reasonable attorneys' fees.

Hamlin v. Charter Township of Flint, 165 F.3d 426, 438 (6th Cir.1999). That is particularly true if the plaintiff agreed to less than all he had originally sought in order to settle his or her case. "[C]ourts should not, as a general rule, penalize parties who settle their disputes by awarding them reduced fees." *West v. Hess Environmental Services, Inc.*, 1997 WL 189507 at *3 (6th Cir. April 17, 1997).

> Similarly, the Seventh Circuit has held that
>
> even [if] the complaint set out an absurd claim for damages, that should not be used

> against plaintiffs who obtained a significant judgment.... In cases which involve more than a nominal award, we have rejected the notion that the fee award should be reduced because the damages were smaller than a plaintiff originally sought.

Estate of Enoch v. Tienor, 570 F.3d 821, 823 (7th Cir.2009).

> This court has repeatedly rejected the notion that the fees must be calculated proportionally to damages. The principle applies equally to purported disproportionality between the relief requested and that received.

Sheehan v. Donlen Corp., 173 F.3d 1039, 1048 (7th Cir.1999). Several circuits hold that so long as the relief obtained by a plaintiff is "substantial," it would be inappropriate to reduce a fee request because the monetary relief was smaller than the amount prayed for in the original complaint. *Lunday v. City of Albany*, 42 F.3d 131, 134-35 (2d Cir.1994) ("substantial" damage award precluded reduction, even though award was only 2% of amount claimed in complaint); *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 340 (1st Cir.1997) ("substantial" damage award precluded reduction, even though award was only 3% of amount claimed in complaint); *Flitton v. Primary Residential Mortgage, Inc.*, 614 F.3d 1173, 1178 (10th Cir.2010) ("substantial" damage award precluded reduction, even though award was only 1.4% of amount claimed in complaint).

(2) The courts of appeals are similarly divided about whether a fee award may (or must) be reduced because the plaintiff who prevailed on one claim had also asserted other related claims which were unsuccessful. Several circuits, including the Fourth Circuit, approve fee reductions on that basis; other circuits have rejected that approach.

In the instant case, for example, the Fourth Circuit held that a fee reduction was warranted because the complaint included alternative "state law claims ... which were not 'successfully' prosecuted." (Pet. App. 11a; see Pet. App. 10a-11a (emphasizing "[a]ppellants' unsuccessful claims").

The Ninth Circuit has repeatedly mandated fee reductions on this basis. In *Dream Palace v. Maricopa County*, 342 Fed.Appx. 342 (9th Cir.2009), the plaintiff had prevailed on four of sixteen claims challenging a county ordinance. The Ninth Circuit held that a 89% reduction of the lodestar was warranted "[g]iven the sheer volume of losses as compared with wins." 342 Fed.Appx. at 343. In *Webb v. Sloan*, 330 F.3d 1158 (9th Cir.2003), the plaintiff had won a jury verdict of $80,000. The Ninth Circuit held that a 25% fee reduction was "appropriate" because the plaintiff "initially sued several defendants, but prevailed against only one." 330 F.3d at 1169. In *Corder v. Brown*, 25 F.3d 833 (9th Cir.1994), the plaintiff won $424,006 in damages; the Ninth Circuit held that in determining the appropriate fee the district court "should give primary consideration to ... [the fact that] the number of defendants found liable [3] as compared to the

number of defendants sued [45] is insignificant." 25 F.3d at 837. In *Cabrales v. County of Los Angeles*, 864 F.2d 1454 (9th Cir.1988), the plaintiff prevailed in her claim against the county and one individual defendant, winning an award of $157,500, but her claims against the other individual defendants were unsuccessful. The court of appeals upheld a 25% lodestar reduction on that basis, explaining that "we read *Hensley* as *requiring* a reduction for limited success even if the claims are related." 864 F.2d at 1466 n.11 (emphasis added). The Ninth Circuit insisted that "we cannot agree with the Court of Appeals for the Seventh Circuit's conclusion" to the contrary, expressly disapproving the Seventh Circuit decision in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir.1983). *Id.*

Most circuits, however, disapprove fee reductions on this basis. In *Mary Beth G.* the Seventh Circuit held that a plaintiff could be compensated for work done on an ultimately unsuccessful claim if it sought relief "for essentially the same course of conduct" as a successful claim. 723 F.2d at 1279. A fortiori the fee for hours worked on a successful claim should not be reduced because of the mere assertion of such a related but unsuccessful claim. See 723 F.2d at 1280-81 (fee may not be reduced on ground that plaintiff obtained relief against some but not all named defendants). The Seventh Circuit has cogently explained why counsel fee awards should not be reduced merely because a plaintiff had prevailed on only one but not all of several related claims.

> For tactical reasons and out of caution lawyers often try to state their client's claim in a number of different ways, some of which may fall by the wayside as the litigation proceeds.... [I]f [the lawyer] presents a congeries of theories each legally and factually plausible, he is not to be penalized just because some, or even all but one, are rejected, provided that the one or ones that succeed give him all that he reasonably could have asked for.

Lenard v. Argento, 808 F.2d 1242, 1245-46 (7th Cir.1987).

The Tenth Circuit has repeatedly held that a lodestar cannot be reduced because a plaintiff who prevailed on one claim did not also prevail on other claims arising out of the same course of action. In *Jane L. v. Bangerter*, 61 F.3d 1505 (10th Cir.1995), the Tenth Circuit overturned a trial judge's decision that had reduced the lodestar by 75% on that basis. Because the litigation had achieved the plaintiffs' "primary purpose," success on one theory "preclude[d] reduction of the lodestar on the basis of those alternative theories." 61 F.3d at 1513. In *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir.1990), the plaintiff had succeeded on her claim under the Age Discrimination in Employment Act, but two state law claims arising out of the same actions had been rejected. The Tenth Circuit held that "controlling case law" mandated that the plaintiff's attorney be "fully compensated." 894 F.2d at 1159; see *Robinson v. City of Edmond*, 160 F.3d 1275, 1283 (10th Cir.1998) ("Litigants should be

given the breathing room to raise alternative legal grounds without fear that merely raising an alternative theory will threaten the attorney's subsequent compensation").

The District of Columbia Circuit has emphatically held that where a plaintiff has prevailed on one claim the lodestar cannot be reduced because a plaintiff did not also prevail on other related claims.

> [A] plaintiff's failure to prevail on a related count is not in itself a sufficient ground for reducing her fees. It is a plaintiff's overall success, and not the number of counts she prevails on, that determines the amount of fees she is entitled to.... A lawyer who wins full relief for her client on one of several related claims ... is not apt to be criticized because the court failed to reach some of the grounds, or even ruled against the client on them. In fact, a lawyer may not be able to meet her ethical obligations if she does not pursue reasonable, alternative claims.

Goos v. National Association of Realtors, 68 F.3d 1380, 1384-86 (D.C.Cir.1995).

The Sixth Circuit has also barred fee reductions on this basis. *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1169 (6th Cir.1996) (where a plaintiff's hiring, promotion and pay discrimination claims are related, "court should not reduce attorney fees due to the plaintiff's success on only some of these claims"); *Wayne v. Village of Sebring*, 36 F.3d 517, 532 (6th Cir.1994) (reversing trial judge's decision which

had reduced fee because plaintiff prevailed against city but not against all individual defendants); *Lilley v. BTM Corp.*, 958 F.2d 746, 756 (6th Cir.1992) (where plaintiff prevailed on retaliation claim, it would be error to reduce fee because plaintiff did not also prevail on related discrimination claim).

The Second Circuit holds that a fee award cannot be reduced because the original complaint contained claims which were initially "pursued in good faith, but later withdrawn for valid reasons." *Green v. Torres*, 361 F.3d 96, 100 (2d Cir.2004). Counsel fee provisions, the court explained, do not impose "more rigorous pleading requirements ... at the risk of a later fee reduction." *Id.* Rather, in assessing degree of success that circuit compares the monetary relief awarded to the size of awards typical "in the same type of case." *DiFillippo v. Morizio*, 759 F.2d 231, 236 (2d Cir.1985).

(3) These circuit conflicts regarding the relevance (and proper measure) of degree of success have their origins in the decisions of this Court; a key source of the lower court confusion in this instance is that the standards articulated by this Court have evolved over the last three decades.

Under the standard originally articulated in this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), degree of success played two distinct roles in determining the size of a fee award. First, *Hensley* indicated that in determining a lodestar fee, a court could consider the twelve factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (4th

Cir.1974). 461 U.S. at 434 n.9. One of the *Johnson* factors is "the amount involved and the results obtained." 461 U.S. at 430 n.3. Second, after the lodestar fee has been determined, *Hensley* directed that the fee is to be adjusted based on the "level of success." 461 U.S. at 434. "Results obtained," *Hensley* explained, was an "important," often "particularly crucial" factor. *Id.* Thus under *Hensley* the lodestar was no more than a "useful starting point," 461 U.S. at 433, after which the courts were to adjust the amount of the fee award based on a case-specific degree of success inquiry.

Since *Hensley*, however, much of this has changed. Although *Hensley* suggested that the lodestar would routinely be adjusted upward or downward, based on degree of success, subsequent decisions of this Court make clear that such adjustments are not to be the norm. *Blum v. Stenson*, 465 U.S. 886 (1984), held that the lodestar was "presumed to be the reasonable fee," and "normally" was the amount to be awarded. 465 U.S. at 897. Subsequent decisions reiterated that the lodestar figure would ordinarily be the fee awarded. *City of Riverside*, 477 U.S. at 568 (lodestar is "presumed to be the reasonable fee"). In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986), this became a "strong presumption." *Delaware Valley* described *Blum* has having "refined our views." *Delaware Valley* emphasized that the lodestar "is more than a mere 'rough guess' or initial approximation," and disavowed *Hensley's* "expansive view" of the considerations that might lead a court to "adjust the fee upward or downward."

478 U.S. at 564.[8] Most recently *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010), held that the "'strong presumption' that the lodestar figure is reasonable" may be overcome only in "rare circumstances." 130 S.Ct. at 1673. This evolution left relatively little room to adjust the lodestar figure itself based on degree of success, or any other consideration.

Decisions after *Hensley* also moved away from use of the twelve *Johnson* factors in determining the lodestar itself, criticizing that lengthy list of criteria (which included consideration of the amount involved and result obtained) as providing "very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Delaware Valley*, 478 U.S. at 563. Under this Court's more recent decisions the lodestar is calculated by multiplying hours reasonably expended times the appropriate hourly rate. The hourly rate itself is based on "the prevailing market rates [for the attorney in question] in the relevant community," *Blum*, 465 U.S. at 895, and is the level of payment "adequate to attract competent counsel." *Id.* at 897. This market rate approach, unlike the

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[8] *Brytus v. Spang & Co.*, 203 F.3d 238, 242 (3d Cir.2000) ("Originally, it was contemplated that the lodestar could be adjusted upward or downward depending on a variety of factors, ... but more recently the Supreme Court has sharply limited the number of factors which can be considered in adjusting the lodestar amount.").

multiple *Johnson* factors, "cabins the discretion of trial judges ... and produces reasonably predictable results." *Id.*

But these more recent decisions of this Court have never expressly disavowed the expansive and highly discretionary approach in *Hensley*, which permitted trial judges to consider a host of other factors – including degree of success – in determining and modifying the lodestar.[9] In the absence of a definitive account of this evolving standard, the lower courts have understandably reached divergent results.

(4) Both of these disputed degree-of-success bases for reducing fee awards undermine the fundamental purpose of fee-shifting statutes, to assure effective legal representation of plaintiffs whose claims enforce the underlying substantive statutes.

As several circuits have correctly noted, if the standard for fee awards penalized attorneys who include multiple counts in a complaint, lawyers would have a financial incentive to avoid raising alternative legal theories, even though the interests of their clients would be best served by asserting all such claims. Similarly, by framing a complaint that asks for a lower level of damages, or by deliberately omitting requests for a type of relief that may be more difficult

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[9] "There is a real tension between the holdings in *Farrar*, *City of Riverside*, and *Hensley*, in terms of the weight which should be given to the degree of success obtained." *Smith v. District of Columbia*, 466 F.Supp. 151, 161 (D.D.C. 2006).

to obtain, a lawyer lowers the risk that his or her fee will be reduced because that greater or additional relief was not obtained; such pleading tactics, however, would be inconsistent with the attorney's duty to provide zealous advocacy.

These two types of fee reductions also create a serious obstacle to settlement. Settlement ordinarily involves a degree of compromise, with the plaintiff accepting less than all the relief that was sought in the original complaint. Often such compromises are in the best interest of the plaintiff. But under the standard applied in the court below and in several other circuits, plaintiff's counsel is penalized for having negotiated such an agreement, and has a perverse incentive to encourage his or her client to press forward in the litigation in the hopes of winning more.

As this Court emphasized in *Perdue v. Kenny A.*, "a 'reasonable fee' is a fee that is sufficient to induce a capable attorney to undertake representation of a meritorious ... case." 130 S.Ct. at 1672. But neither the amount of relief obtained (in comparison to what was sought) nor the portion of related claims on which a plaintiff prevails are necessarily measures of the skill or performance of the plaintiff's attorney. A lesser degree of success often will reflect, instead, "[exceptional] performance by defense counsel, ... unexpectedly [un]favorable rulings by the court, an unexpectedly [un]sympathetic jury, or simple [bad] luck." 130 S.Ct. at 1674. Failure to prevail on some claims, or to obtain all relief that was sought, may

also result from the difficulty of the underlying issues, rather from any lack of skill on the part of counsel.

Fee reductions based on these disputed degree-of-success factors, like fee reduction based on proportionality, is fundamentally inconsistent with this Court's efforts to fashion counsel fee standards that will yield predictable, non-arbitrary results. Another district judge in the Fourth Circuit, presented with the same circumstances as in the instant case, could have chosen to impose no fee reduction at all, or to reduce the fee award even more. The very unpredictable nature of these standards often guarantees that counsel fee disputes will result in protracted litigation. In the instant case the underlying merits issues were settled only three months after the case was filed; the counsel fee dispute, on the other hand, has now lasted for several years and has generated a series of lower court opinions.

This case presents an excellent vehicle for addressing these issues. The FLSA claim and the state law claims here arose out of the same facts, and were closely related. Those claims embodied alternative legal theories; although under Fourth Circuit precedent the FLSA (if applicable) preempted the state claims (and thus barred the types of relief available under state law), the plaintiffs had to assert the alternative state law claims because of the possibility that a court might hold that the FLSA did not apply to the employer in this case because it was too small in size. The litigation was resolved on the basis of precisely the sort of settlement favored by the FLSA;

the plaintiffs obtained full monetary relief on their individual FLSA claims. The defendant never argued, and the trial judge did not suggest, that the compromise inherent in the settlement reflected any lack of skill or inadequate performance on the part of plaintiffs' counsel.

Certiorari should be granted to resolve these recurring questions of law, and to make clear that the principles in *Perdue* that limit enhancements of market rates and cabin the discretion of trial judges apply with equal force to reductions in those market rates.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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United States Court of Appeals,
Fourth Circuit.

Tanya JACKSON; Michael Agyeman; Thomas George; Isaac Asave, on behalf of themselves and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

ESTELLE'S PLACE, LLC; Jireh Place, LLC; Our Place, LLC; Destiny Place, LLC; Debra Roundtree; Mary Bell, Defendants-Appellees.

Metropolitan Washington Employment Lawyers Association; Washington Lawyers' Committee for Civil Rights and Urban Affairs, Amici Supporting Appellants.

No. 09-1700.
Argued May 14, 2010.
Decided Aug. 12, 2010.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:08-cv-00984-LMB-TRJ).

Before GREGORY, AGEE, and DAVIS, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

Judge GREGORY wrote a dissenting opinion.

ARGUED: Nicholas Woodfield, Employment Law Group, PC, Washington, D.C., for Appellants. Edward S. Rosenthal, Rich Rosenthal Brincefield Manitta Dzubin & Kroeger, LLP, Alexandria, Virginia, for Appellees.

ON BRIEF: R. Scott Oswald, Employment Law Group, PC, Washington, D.C., for Appellants. Katelin T. Moomau, Jonathan A. Simms, Rich Rosenthal Brincefield Manitta Dzubin & Kroeger, LLP, Alexandria, Virginia, for Appellees. Susan E. Huhta, Laura E. Varela, Washington Lawyers' Committee for Civil Rights & Urban Affairs, Washington, D.C., for Amici Supporting Appellants.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Appellants Tanya Jackson, Michael Agyeman, Thomas George, Isaac Asare, Sharon Doss, and Courtney Collins are present and former employees of several related entities that operate group homes for the developmentally disabled. Appellees, defendants below, are those entities and their principals (Estelle's Place, LLC; Jireh's Place, LLC; Our Place, LLC; Destiny's Place, LLC; Debra Roundtree, and Mary Bell). Appellants' claims arose under the overtime pay provision of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"), and state law. Early on, the parties settled the action, leaving to the district court, however, determination of the amount of attorney's fees to be awarded to Appellants as prevailing parties. *See id.* at § 216(b). Feeling aggrieved by the amount of the district court's award of

attorney's fees ($36,000), Appellants filed the instant appeal.[1] For the reasons set forth below, we affirm.

I.

Appellants Jackson, George, Asare, Doss, and Collins were compensated on an hourly basis; Appellant Agyeman, on the other hand, though not paid hourly, was nonetheless misclassified as an exempt employee for overtime purposes. Appellees effected the underpayments of wages by assigning Appellants to work a total of more than 40 hours per week, but at different group homes, while treating work at each group home (owned by a separate but related corporate entity) as work for a separate employer. Consequently, Appellees paid Appellants at the straight time rate rather than at the overtime rate of time-and-a-half for hours worked beyond 40 per week.

On September 22, 2008, Appellants Jackson, Agyeman, George, and Asare filed suit in the United States District Court for the Eastern District of Virginia against Appellees, seeking unpaid overtime compensation under the FLSA. Appellants Doss and Collins opted into the litigation as plaintiffs. Meanwhile, Appellants filed a Motion to Allow Notice to

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[1] Although Appellants noted their appeal only from the denial of their motion to alter or amend the district court's order awarding attorney's fees, we have jurisdiction to consider the merits of the underlying order. *See, e.g., Brown v. French*, 147 F.3d 307, 311 (4th Cir.1998).

Similarly Situated Employees and to Approve Interrogatory to Defendants Seeking the Identity of Similarly Situated Employees. On December 19, 2008, the district court granted Appellants' motion. Shortly after the district court ordered publication of notice of the pendency of the lawsuit to other employees, but before such notice was published, the parties negotiated a Confidential Settlement Agreement and General Release resolving all of Appellants' claims.

The Settlement Agreement stipulated that Appellants would be paid additional wages equal to unpaid overtime compensation (i.e., half-time) for all hours or fractions thereof worked in excess of 40 hours during any one work week (from September 22, 2005, through the date of the settlement), plus an equal amount in liquidated damages. The parties then stipulated to the following settlement amounts: Asare ($430.00), Collins ($567.50), Doss ($490.00), George ($4,032.00), Jackson ($1,963.50), and Agyeman ($12,471.34). Notably, of the 13 forms of relief sought in the complaint, nine were not addressed in the Settlement Agreement and were wholly abandoned by Appellants.[2] In particular, no injunctive relief was

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[2] These nine prayers for relief were for (1) an order appointing plaintiffs and their counsel to represent similarly situated employees as to the FLSA claims, (2) certification of the breach of contract and quantum meruit classes and designation of plaintiffs as class representatives and their counsel as class counsel, (3) a preliminary and permanent injunction prohibiting the defendants from engaging in the allegedly unlawful practices, (4) an order awarding declaratory relief, (5) an order

(Continued on following page)

awarded, no relief was awarded on any state law claim, and Appellees were not required to alter their method of operation. In any event, pursuant to the Settlement Agreement, the district court entered an Agreed Order of Dismissal in Part, dated February 23, 2009, dismissing all of Appellants' claims with prejudice, reserving for itself the issue of attorney's fees and costs, as the parties had agreed.

Appellants promptly filed their motion for an award of attorney's fees. Following full briefing and a hearing, the district court issued a Memorandum Opinion and Order granting attorney's fees and costs. The district court noted that under this court's precedents, a reasonable fee would be calculated by determining a lodestar fee, followed by any appropriate reductions. *See Grissom v. The Mills Corp.*, 549 F.3d 313 (4th Cir.2008), where we stated:

> The parties also agree that after calculating the lodestar figure, the "court then should subtract fees for hours spent on unsuccessful claims unrelated to successful ones." *Johnson v. City of Aiken,* 278 F.3d 333, 337 (4th Cir.2002). "Once the court has subtracted the fees incurred for unsuccessful, unrelated claims, *it then awards some percentage of the*

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awarding restitution and disgorgement of profits, (6) a judgment awarding plaintiffs economic, compensatory damages, liquidated damages, and punitive damages, (7) pre-judgment interest, (8) equitable relief such as employment, reinstatement, promotion, or frontpay, and (9) interest due on unpaid wages.

> *remaining amount, depending on the degree of success enjoyed by the plaintiff." Id.*

Id. 321 (emphasis added); *see also Robinson v. Equifax Information Services, LLC,* 560 F.3d 235, 243 (4th Cir.2009).

The district court determined the appropriate hourly rates for counsel for Appellants, ranging from $350.00 per hour for the most experienced lawyer to $60.00 per hour for the legal assistant. The district court then determined the total hours reasonably expended by the four people who worked on the case. Thus, the district court arrived at what it described as a "lodestar fee" of $47,800. Then, in determining the ultimate issue of a reasonable fee, the district court noted that only six plaintiffs joined the lawsuit, and their total recovery amounted to less than $10,000.00 before it was doubled under FLSA's liquidated damage provision. The court further noted that, of the six awards, four were for less than $1,000.00 before doubling and that Agyeman received the largest recovery, based only on his misclassification. Thus, the court reasoned that the $47,800.00 "lodestar fee" should be reduced because "[a]n attorneys' fee should bear some reasonable relationship to the recovery of plaintiffs." Given the "modest value" of the successful claims, the court determined that a reasonable fee, which it also described as a "lodestar," amounted to $36,000.00.

On May 18, 2009, Appellants filed a Motion to Alter or Amend the district court's order granting fees

and costs pursuant to Fed.R.Civ.P. 59(e). On June 9, 2009, the district court denied Appellants' motion. Appellants have timely appealed.

II.

A.

We review a district court's award of attorney's fees for abuse of discretion. *Johnson v. City of Aiken,* 278 F.3d 333, 336 (4th Cir.2002) (citing *McDonnell v. Miller Oil Co.,* 134 F.3d 638, 640 (4th Cir.1998); *Freeman v. Case Corp.,* 118 F.3d 1011, 1014 (4th Cir.1997)). "Our review of the district court's award is sharply circumscribed; we have recognized that because a district court has close and intimate knowledge of the efforts expended and the value of the services rendered, the fee award must not be overturned unless it is clearly wrong." *Plyler v. Evatt,* 902 F.2d 273, 277-78 (4th Cir.1990) (internal quotation marks, citations, and alteration marks omitted).

B.

A prevailing party is entitled to an award of reasonable attorney's fees and costs pursuant to the FLSA. *See* 29 U.S.C. § 216(b). Here, because the parties have agreed that Appellants are prevailing parties, Appellants are entitled to an award of attorney's fees and costs that they establish as reasonable. *See Plyler,* 902 F.2d at 277.

Appellants' challenge to the award in this case is a narrow one. Although Appellants sought fees and costs in excess of $87,000, they do not assign error to the district court's initial determination that the traditional lodestar amount in this case (hours worked x appropriate hourly rate) was $47,800. Rather, they limit their challenge to the district court's ultimate determination that a reasonable fee was the traditional lodestar amount less approximately 25%. Appellants make two arguments in support of their contention that the district court abused its discretion in reducing the traditional lodestar by approximately 25% in this case. First, they contend that our opinion in *Grissom* does not allow such a reduction. Second, they contend that even if *Grissom* could be interpreted to allow such a reduction, such a reduction is prohibited by *City of Riverside v. Rivera,* 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), and by the Supreme court's recent opinion in *Perdue v. Kenny A.,* ___ U.S. ___, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010). We disagree.

1.

We have set forth the *Grissom* methodology, 549 F.3d at 320, above, which the district court cited in its order and which provides in part that a court should "award[ ] some percentage of the remaining amount [after reductions for unsuccessful claims], *depending on the degree of success enjoyed by the plaintiff.*" (Emphasis added) Appellants contend that, inasmuch as they enjoyed "complete success on all

claims," Appellant's Br. 11, there should not have been any reduction for their pursuit of unsuccessful claims and that, therefore, their "degree of success" under *Grissom* was effectively one hundred percent. Thus, according to Appellants, under *Grissom*, the only appropriate "percentage" of the traditional lodestar amount that constituted a "reasonable fee" is one hundred percent.

In support of this contention, Appellants seize on the district court's statement that "[i]t is unnecessary to subtract fees incurred for unsuccessful, unrelated claims or award only a percentage of this amount because plaintiffs settled all of their claims for full value." Having carefully reviewed the district court's orders, it is clear to us that, in context, the district court indeed followed *Grissom*, albeit somewhat awkwardly. In other words, we agree with Appellants to the extent that they contend that the methodology followed by the district court is somewhat less precise than one would hope, but we reject the contention that the district court deviated from the core mandate of *Grissom* in calculating a "reasonable fee."

Like most (if not all) of the courts of appeals, we have directed that in deciding what constitutes a reasonable number of hours and the appropriate hourly rates (i.e., in calculating the lodestar fee), a district court looks to the following twelve factors:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the

> legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n. 28 (4th Cir.1978) (adopting factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). In this case, the district court properly assessed the 12 factors and focused, most heavily, on factor number eight – "the amount in controversy and the results obtained." In doing so, the district court purported to arrive at an "initial" lodestar fee ($47,800), and then, after consideration of factor number eight, it arrived at its "final" lodestar fee of $36,000. Thus, although the district court arrived at a *reasonable fee* as mandated by *Grissom*, it took the somewhat circuitous route of calculating a "final" lodestar by relying on factor eight in the *Kimbrell's* analysis, rather than by expressly taking account of Appellants' unsuccessful

claims and then taking a "percentage reduction" from the traditional lodestar, as contemplated by *Grissom*.[3]

Under the circumstances here, we have no hesitation in leaving undisturbed what the district court did, notwithstanding that its methodology was not congruent with that contemplated by *Grissom*. Plainly, the court was cognizant of the broad scope of the case as Appellants filed it, *see supra* page 5 and note 2, including the presence of state law claims (which were not "successfully" prosecuted) and the request for broad relief, compared to the more modest result achieved. We should not and do not fault the district court for an arguable analytic imprecision where, substantively, no abuse of discretion is evident. In so doing, we bear in mind the following reminder from the Supreme Court:

> [W]e have said repeatedly that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson,* 465 U.S. 886, 888, 104 S.Ct. 1541, 1544, 79 L.Ed.2d 891 (1984). *The courts may*

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[3] The district court described its approach in its order denying the motion to alter or amend, stating that: "After arriving at the lodestar figure of $36,000.00, the Court determined that further reduction [under *Grissom*] was unnecessary because plaintiffs had been fully compensated for the hours they worked. Finding that further reduction was unnecessary does not support the argument that the earlier reduction was in error."

> *then adjust this lodestar calculation by other factors.*

Bergeron, 489 U.S. at 95 (emphasis added); *and see Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992):

> We have [turned to the lodestar model], it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award than the contingent-fee model. *See, e.g.,* Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation").

Id. at 566 (brackets added). In sum, despite its imprecise methodology, the district court plainly acted consonant with our *Grissom* mandate. *See Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (noting that a district court may either identify particular hours to be eliminated or reduce the fee in light of the limited success in calculating fee award).

2.

Appellants' arguments relying on *City of Riverside v. Rivera,* 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), and *Perdue v. Kenny A.,* ___ U.S. ___, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010), fare no better than their arguments relying on *Grissom.* They contend that *City of Riverside* prohibits a limitation

on an award of attorney's fees to a proportion of the damages awarded. As the district court stated, however, *City of Riverside,* did not impose a blanket prohibition on the use of the rule of proportionality. In that case, the Supreme Court merely "reject[ed] the proposition that fee awards . . . should *necessarily* be proportionate to the amount of damages a civil rights plaintiff actually recovers." *City of Riverside,* 477 U.S. at 565 (emphasis added). The Court emphasized the *sui generis* nature of civil rights cases, where plaintiffs "seek[ ] to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms" and fee awards are used to deter future violations. *Id.* at 575-76. Nevertheless, the Court expressly held that "[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988." *Id.* at 574. There is no indication here that the district court relied solely on a proportionality approach.

Appellants' reliance on the Supreme Court's recent decision in *Perdue* is similarly unavailing. They contended in their Rule 28(j) submission that *Perdue* involved a rejection of an "arbitrary enhancement" of a lodestar fee, and that "if an arbitrary enhancement of the lodestar is reversible error, an arbitrary reduction of the lodestar would be . . . an abuse of discretion and reversible error." Appellants overstate, if they do not misstate, the holding in that case. In *Perdue,* the Court held that an attorney's fee based on the lodestar may be increased due to superior performance, but only in extraordinary

circumstances. 130 S.Ct. at 1674. But while the Court held that an enhancement to the lodestar fee may be permissible, it found the justification there inadequate. Indeed, *Perdue* makes plain that the lodestar figure, though supported by a "strong presumption" of correctness, is not invariably the end of the analysis but, in some classes of cases, only the beginning:

> In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. *The lodestar method was never intended to be conclusive in all circumstances.* Instead, there is a "strong presumption" that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.

Id. at 1673 (emphasis added). In any event, nothing in *Perdue* persuades us that the district court's reduced fee award here was in any sense "arbitrary" or was otherwise the product of an abuse of discretion.

III.

For the reasons set forth above, the orders of the district court are

AFFIRMED.

GREGORY, Circuit Judge, dissenting:

The fee award in this case is clearly wrong. After calculating the initial lodestar fee of $47,800, the district court stated that based on "the amount involved and the results obtained," it was reducing the fee award by twenty-five percent. J.A. 369.[1] While the majority correctly notes that this is an appropriate factor to consider under our precedent, we also have precedent that mandates such consideration occurs by comparing the relief sought to the relief awarded. Under the latter case law, I am left with the inescapable conclusion that the court abused its discretion by focusing on the value of the employees' claims and thus respectfully dissent.

I.

This Court has recognized that the factor relied on by the district court to reduce the lodestar fee, "the amount in controversy and the results obtained," *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir.1978), is largely coextensive with the court's consideration of the employee's "degree of success." *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 190 (4th Cir.2007). "When considering the extent of the relief obtained, we must compare the amount of the damages sought to the amount awarded." *Mercer v. Duke Univ.*, 401 F.3d 199, 204 (4th Cir.2005). This

[1] Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties in this appeal.

comparison "rests on the idea that a prevailing plaintiff is less worthy of a fee award when one or more of his claims lack merit – that is, when he cannot demonstrate that he deserves the compensation he demanded in his complaint." *Nigh,* 478 F.3d at 190.

The above analysis is consistent with the Supreme Court's elucidation of how district courts should account for the "degree of success." In *Hensley v. Eckerhart,* the Supreme Court stated that in considering the "degree of success," "[t]he result is what matters." 461 U.S. 424, 435-36, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (finding that in a case where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount"). The Court found that although district courts have discretion in making these judgments, the courts must consider this success or result "in comparison to the scope of the litigation as a whole." *Id.* at 440. For example, in *Hensley* itself, the Court explained that "had respondents prevailed on only one of their six general claims, . . . a fee award based on the claimed hours clearly would have been excessive." *Id.* at 436.

Following these principles, courts have reduced fee awards where FLSA plaintiffs recovered only a portion of the amount actually sought. *See, e.g., Saizan v. Delta Concrete Prods. Co., Inc.,* 448 F.3d 795, 801 (5th Cir.2006) (affirming the district court's reduction of the lodestar fee due to the difference between the amount initially sought in the complaint

and the ultimate settlement amount); *Spegon v. Catholic Bishop of Chicago,* 175 F.3d 544, 558 (7th Cir.1999) (affirming the district court's reduction of the lodestar fee because the plaintiff failed to obtain the full overtime pay that was asserted in the complaint and failed all-together on his claim for discrimination and its accompanying request for damages). Courts have also reduced fee awards based on degree of success when the plaintiffs prevailed on only some of the claims brought. *See, e.g., Spegon,* 175 F.3d at 558; *Baird v. Boies, Schiller & Flexner LLP,* 219 F.Supp.2d 510, 523-24 (S.D.N.Y.2002).

In light of the above case law, the district court's focus on the damages awarded *as compared to the attorneys' fee* is more than "analytic imprecision" or "imprecise methodology." Maj. Op. at 12. Rather, it constitutes error. In its initial determination of the fee, the court stated that the employees' "total recovery was less than $10,000 before being doubled under the liquidated damages provision of the FLSA," that "of the six awards, four were less than $1,000 before doubling," and that "[a]n attorneys' fee should bear some reasonable relationship to the recovery of the plaintiffs." J.A. 369. The court then stated that it was reducing the lodestar fee by twenty-five percent "[g]iven the modest value of the plaintiff's claims." J.A. 369. No other explanation was given for the fee reduction at the time of the determination. No comparison of the relief sought to the relief awarded was conducted by the court, as mandated by case law when considering "results" or the "degree of success."

Nor did the court decide that any claims put forward by the employees lacked merit. Subsequently responding to the employees' objection to the fee reduction, the court's main justification for reducing the fee remained its belief that "the amount of plaintiffs' claims and their eventual recovery was quite modest." J.A. 418.

"A presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award." *Cowan v. Prudential Ins. Co. of America,* 935 F.2d 522, 526 (2d Cir.1991). The size of the damage award carries even less weight here given that the case arose under the fee-shifting provision of the FLSA. *See Quaratino v. Tiffany & Co.,* 166 F.3d 422, 426 (2d Cir.1999) ("Congress enacted fee-shifting in civil rights litigation precisely because the expected monetary recovery in many cases was too small to attract effective legal representation."); *Fegley v. Higgins,* 19 F.3d 1126, 1134-35 (6th Cir.1994) ("The purpose of the FLSA attorney fees provision is to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances. Courts should not place an undue emphasis on the amount of the plaintiff's recovery because an award of attorney fees here encourage[s] the vindication of congressionally identified policies and rights." (alteration in original) (internal quotation marks and citations omitted). Thus, by subjectively labeling the employees' success "modest" and failing to look at the success of the employees' claims "in comparison to the scope of the

litigation as a whole," *Hensley*, 461 U.S. at 440, the court abused its discretion.

While the court did have discretion to consider the size of the damages award, that amount was relevant only when compared to the damages sought. *Mercer*, 401 F.3d at 204. The district court itself found that no reduction for "degree of success" was necessary because the employees "*settled all of their claims for full value.*" J.A. 370 (emphasis added). I assume that the district court meant what it said. Indeed, full success is supported by the record. The employees negotiated a settlement that provided them with the maximum monetary relief due under the FLSA – the full amount of overtime pay owed plus an equal amount of liquidated damages. When compared to the scope of litigation as whole, which evolved solely around the FLSA claims, this relief cannot be classified as limited. There was no other claim that the employees *failed* to succeed on the merits, and the majority even agrees that the settlement agreement "resolv[ed] all of Appellants' claims ." Maj. Op. at 4. Thus, the full lodestar fee should have been awarded.[2]

The majority closes its eyes to the district court's focus on the value of the employees' claims. Beyond repeating the same mistake made by the district

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[2] This is especially so given the "strong presumption" that the full lodestar fee is reasonable and owed to prevailing attorneys. *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

court – judging the result obtained as "modest" in and of itself, see maj. op. at 12 (describing the employees' full recovery as a "modest result") – the majority seems to assert that the district court correctly compared the result obtained to the result sought in justifying the fee reduction. This cannot be the case. The district court did, only after the employees objected, state that it compared the relief sought to the relief obtained, and that the employees "did not receive any of the other forms of relief they sought in the complaint." J.A. 418.[3] The court is referring to the prayer for relief contained in the complaint, which sought punitive damages, a request for declaratory judgment, and various forms of injunctive relief. The majority likewise cites to the prayer for relief, maj. op. at 5, as proof that a fee reduction is appropriate because the employees failed to obtain every form of relief requested. In this case, placing such a burden on the employees in order for them to obtain the full lodestar fee, which is presumptively reasonable, is unfounded. First, as the employees and *amicus* point

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[3] The court also claims that the employees obtained limited success because only six employees joined the lawsuit. It is unclear how this fact means that the six employees that did opt in were not successful. The fact that they settled their claims within seven days of the district court's granting their Motion to Allow Notice to Similarly Situation [sic] Employees would seem to indicate that the employers settled quickly to avoid a larger damages award, meaning the employees *were* successful. If the court did rely on the number of employees that opted in, this was legal error. *See Estrella v. P.R. Painting Corp.*, 596 F.Supp.2d 723, 727-28 (E.D.N.Y.2009).

out, punitive damages and reinstatement or other injunctive relief are not available for claims under the FLSA. *EEOC v. Gilbarco, Inc.*, 615 F.2d 985, 987 n. 1 (4th Cir.1980) (finding that only the Secretary of Labor may bring an action for injunctive relief); *Lanza v. Sugarland Run Homeowners Ass'n,* Inc., 97 F.Supp.2d 737, 741 (E.D.Va.2000) (holding that punitive damages are not allowed under the FLSA). Therefore, the employees argue that the request for such relief was merely boilerplate language and should not provide a basis for finding limited success. There is support for this assertion. *See Smith v. District of Columbia,* 466 F.Supp.2d 151, 160 (D.D.C.2006) ("The District of Columbia argues that Plaintiff's degree of success – the award of $72,000 – should be measured against the *ad damnum* clause in her Complaint. That is just plain foolish. *Ad damnum* requests, as all judges and litigants know, rarely bear any relationship to reality or expectations."). Second, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Hensley,* 461 U.S. at 435. Here, the result was significant and the best possible under the FLSA, which was the employees' *only* stated source of relief. In "the scope of the ligation as a whole," *id.* at 440, the relief was not limited.

Finally, because the other relief referred to by the district court and the majority is available only through the breach of contract or quantum meruit

claims, the court must have necessarily meant that the failure of the employees to prevail on those claims, in addition to the FLSA claim, merited a reduction in the lodestar fee. The majority specifically cites "the presence of state law claims." Maj. Op. at 12. Yet, it was impossible for the employees to prevail on both the FLSA claim and the breach of contract/quantum meruit claims. Quantum meruit was an alternative to the breach of contract claim. Additionally, the breach of contract claim nowhere relies on Virginia law and asserts no contractual basis for the claim other than the FLSA. Thus, the breach of contract duplicates the FLSA claim and is preempted under this Circuit's precedent. *See Anderson v. Sara Lee Corp.,* 508 F.3d 181, 194 (4th Cir.2007). The court, therefore, relied on an alternative claim on which the employees had no chance of success.

It is telling that the majority omits discussion of the district court's final rationale for reducing the lodestar fee – that the employees "did not achieve the sort of public benefits discussed in *City of Riverside.*" J.A. 418. This assertion is patently incorrect. As the court itself recited in the same order, "damages in civil rights cases also serve[ ] the public interest, for example, by deterring future civil rights violations." J.A. 417 (citing *City of Riverside v. Rivera,* 477 U.S. 561, 575, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986)). In *City of Riverside,* the Supreme Court stated, "[r]egardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected

in nominal or relatively small damages awards." 477 U.S. at 574. Thus, the public interest promoted by civil rights statutes, such as the FLSA, "is perhaps most meaningfully served by the day-to-day private enforcement of these rights, which secures compliance and deters future violations." *Quarantino,* 166 F.3d at 426. Therefore, counsel's efforts to secure a full recovery in this case is exactly the type of private enforcement of wage and hour rights that achieves a public benefit. *See Wales v. Jack M. Berry, Inc.,* 192 F.Supp.2d 1313, 1327 (M.D.Fla.2001) ("It is recognized that the FLSA is an important piece of social legislation. Accordingly, the public derived a benefit from the plaintiffs' recovery on their FLSA claims."). Sadly today's opinion discounts the public benefit that unquestionably accompanied counsel's efforts.[4]

II.

Additionally, the majority fails to recognize that although the court did not run afoul of the Supreme Court's rejection of a rule of strict proportionality, *see City of Riverside,* 477 U.S. at 578, the district court's emphasis on the size of the attorneys' fee and its pro rata reduction of the fee comes dangerously close to such violation and has been soundly rejected by other courts. *See Simpson v. Merchants & Planters Bank,*

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[4] The opinion goes further and, in an attempt to affirm the "imprecise" reasoning of the district court, throws in a quote suggesting counsel ran up hours in this case, maj. op. at 12, an allegation of which there is no evidence whatsoever.

441 F.3d 572, 581 (8th Cir.2006) (finding in the context of an Equal Pay Act case that "a pro rata reduction [in attorneys' fees] would not normally be appropriate . . . [and that the court had] explicitly rejected a 'rule of proportionality' in civil rights cases because tying the attorney's fees to the amount awarded would discourage litigants with small amounts of damages from pursuing a civil rights claim in court"); *Kassim v. City of Schenectady,* 415 F.3d 246, 252 (2d Cir.2005) ("Reasoning that a rule calling for proportionality between the fee and the monetary amount involved in the litigation would effectively prevent plaintiffs from obtaining counsel in cases where deprivation of a constitutional right caused injury of low monetary value, we have repeatedly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation.").

Even if the majority is correct that *some* reduction in the fee award was appropriate, which I do not believe to be the case, the district court's method of reducing the award by the arbitrary figure of twenty-five percent without any explanation as to how the percentage was arrived at is an abuse of discretion. It is precisely this subjectivity on the part of the district court that the lodestar analysis guards against, making the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn,* ___ U.S. ___, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010), particularly relevant. In *Perdue,* the Court considered whether a district court abused its discretion in increasing the lodestar fee by

seventy-five percent based on what the court believed to be extraordinary results. *Id.* at 1669. The Court first noted "the lodestar method is readily administrable" because "the lodestar calculation is 'objective,' and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Id.* at 1672 (citations omitted). The Court then noted that while "[t]he lodestar method was never intended to be conclusive in all circumstances," "there is a 'strong presumption' that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." *Id.* at 1673. The court found only a few exceptional circumstances in which superior attorney performance would lead to an increased lodestar fee. *Id.* at 1674. One such instance was when "an attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Id.* However, in such a rare case, the Court held that "the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses." *Id.* at 1674-75.

As for the seventy-five percent increase in the lodestar fee in *Perdue,* the Court found that "this figure appears to have been essentially arbitrary. Why, for example, did the court grant a 75% enhancement

instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?" *Id.* at 1675. Thus, although the Court found that an enhanced fee was possible in some circumstances, it reversed the fee award because "when a trial judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method – providing an objective and reviewable basis for fees is undermined." *Id.* at 1676 (citation omitted).

Here, the same prohibition of subjectivity should apply when a judge asks whether a plaintiff's "results obtained" are limited. The lodestar fee is presumptively reasonable and while the district court did have discretion to reduce the fee based on limited success, the court arbitrarily decreased the lodestar fee by twenty-five percent even if we *assume* success was limited. The court provided no rationale for why the decrease was not above or below the number it chose, offering no "objective and reviewable basis," *id.* at 1676, for the percentage decrease. I therefore believe today's decision undermines the very purpose of the lodestar approach.

III.

Because the district court abused its discretion in reducing the presumptively reasonable lodestar fee based on its determination that the value of the employees' award was "modest" and in arbitrarily choosing a twenty-five percent reduction, I would

reverse the order of the district court and remand with instructions to award the full fee of $47,800.

United States District Court, E.D. Virginia,
Alexandria Division.

Tanya JACKSON, et al., Plaintiffs,

v.

ESTELLE PLACE, LLC, et al., Defendants.

No. 1:08cv984 (LMB/TRJ). June 9, 2009

ORDER

LEONIE M. BRINKEMA, District Judge.

Plaintiffs have filed a Motion to Alter or Amend the Court's May 12, 2009 Order Granting Fees and Costs [Docket No. 58], asking the Court to withdraw its decision to reduce the attorneys' fee award by approximately 25% to $36,000.00 and award them $47,800.00 in attorneys' fees instead. Plaintiffs argue that the 25% reduction constitutes a clear error of law under the Supreme Court's holding in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). Defendants oppose the motion, claiming that a reduction is appropriate under prevailing law. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before us and argument would not aid the decisional process.

On September 22, 2008, plaintiffs Tanya Jackson, Michael Agyeman, Thomas George, and Isaac

Asave[1] filed a Representative Action and Class Action Complaint for Equitable and Monetary Relief [Docket No. 1] on behalf of themselves and other similarly situated employees against defendants Estelle Place LLC, Jireh Place LLC, Our Place LLC, Destiny Place LLC, Debra Roundtree, and Mary Bell. Plaintiffs alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, and common law claims of breach of contract and *quantum meruit*. In their prayer for relief, plaintiffs requested 1) an order appointing plaintiffs and their counsel to represent similarly situated employees as to the FLSA claims, 2) certification of the breach of contract and *quantum meruit* classes and designation of plaintiffs as class representatives and their counsel as class counsel, 3) a preliminary and permanent injunction prohibiting the defendants from engaging in the allegedly unlawful practices, 4) an order awarding declaratory relief, 5) an order awarding restitution and disgorgement of profits, 6) a judgment awarding plaintiffs economic, compensatory damages, liquidated damages, and punitive damages, 7) pre-judgment interest, 8) equitable relief such as employment, reinstatement, promotion, or frontpay, 9) interest due on unpaid wages, and 10) reasonable attorneys' fees and costs.

After the defendants filed answers to the complaint, plaintiffs filed a Motion to Allow Notice to

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[1] Plaintiffs Sharon Doss and Courtney Collins joined the lawsuit after the Complaint was filed.

Similarly Situated Employees, which was granted on December 19, 2008. The parties then requested a stay of the proceedings and negotiated a confidential settlement of the claims. On February 23, 2009, the Court entered an Agreed Order of Dismissal in Part, which dismissed all of plaintiffs' claims, except for the claims for attorneys' fees and costs, which were to be resolved by the Court.

As explained in a Memorandum Opinion dated May 8, 2009, the Court carefully considered the parties' briefs and accompanying affidavits and concluded that an attorneys' fee of $36,000.00 was reasonable. The Court arrived at the $36,000.00 fee by first multiplying the reasonable hourly rate by the reasonable number of hours worked, and then reducing the product by approximately 25% to account for the amount in controversy and the results obtained. After arriving at the lodestar figure of $36,000.00, the Court found that further reduction of the fee was unwarranted and entered an Order awarding plaintiffs $36,000.00 in fees and $407.73 in costs. Plaintiffs timely filed their motion to alter or amend pursuant to Fed. R. Civ. P. 59(e), asking the Court to reconsider its decision to reduce the award by approximately 25%. Plaintiffs do not challenge any other aspect of the award of fees or costs.

A court may properly amend an earlier judgment under Rule 59(e) "to accommodate an intervening change in controlling law, to account for new evidence not available at trial, or to correct a clear error of law or prevent manifest injustice." *See, e.g., Pac. Ins. Co.*

v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Relying on the Supreme Court's decision in *City of Riverside v. Rivera*, 277 U.S. 561, plaintiffs contend that the Court committed reversible error by reducing the fee award by 25% on account of the amount involved and the results obtained.

In *City of Riverside*, the Supreme Court addressed the question of whether a statutory award of attorney's fees was *per se* unreasonable if it exceeded the monetary damages the plaintiff recovered from the lawsuit. 477 U.S. at 565. There, the petitioners argued that an attorney's fee award should be proportionate to the amount of damages the plaintiff won and operate like a contingency fee, so that an attorney's fee would be a percentage of the plaintiff's total recovery. *Id.* at 574. The Court held that "[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded," but "reject[ed] the proposition that fee awards . . . should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *Id.* The Court explained that civil rights litigation was unlike private tort suits, where contingency fees are normally used, because a civil rights plaintiff also "seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Id.* Furthermore, the Court observed that damages in civil rights cases also served the public interest, for example, by deterring future civil rights violations. *Id.* at 575. Although the Court held that a strict rule of proportionality was not appropriate, the

decision clearly allows a district court to consider a plaintiff's monetary recovery, among other factors, when determining a reasonable fee.

In cases decided after *City of Riverside*, the Supreme Court has emphasized that "the most critical factor in determining a fee award is the degree of success obtained." *See Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (internal quotations omitted). The Fourth Circuit has also recognized that the amount of damages a plaintiff receives is a relevant consideration, although not determinative, when calculating a reasonable attorneys' fee. *See, e.g., Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 31, 328 n.20 (4th Cir. 2006).

As discussed in the Memorandum Opinion, the amount of plaintiffs' claims and their eventual recovery was quite modest. Although plaintiffs received the overtime compensation they were owed and liquidated damages as provided by the FLSA, they did not receive any of the other forms of relief they sought in the complaint. Moreover, plaintiffs did not achieve the sort of public benefit discussed in *City of Riverside*, as the settlement did not include any admission of wrongdoing or require the defendants to change their compensation system. Given the amount involved and the results obtained in this litigation, the Court decided that a 25% reduction from the initial figure was appropriate. In coming to this conclusion, the Court was aware that an attorneys' [sic] fee need not be proportionate to the plaintiffs' recovery, but was mindful of the fact that Congress intended for

attorneys to "be compensated only for time reasonably expended." *See City of Riverside*, 477 U.S. at 580 (emphasis omitted).

After arriving at the lodestar figure of $36,000.00, the Court determined that further reduction was unnecessary because plaintiffs had been fully compensated for the hours they worked. Finding that further reduction was unnecessary does not support the argument that the earlier reduction was in error.

For the above stated reasons, it is hereby

ORDERED that the plaintiffs' Motion to Alter or Amend the Court's May 12, 2009 Order Granting Fees and Costs [Docket No. 58] be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 9th day of June, 2009.

Alexandria, Virginia

United States District Court, E.D. Virginia,
Alexandria Division.

Tanya JACKSON, et al., Plaintiffs,

v.

ESTELLE PLACE, LLC, et al., Defendants.

No. 1:08cv984 (LMB/TRJ).May 8, 2009.

MEMORANDUM OPINION

LEONIE M. BRINKEMA, District Judge.

Before the Court is the plaintiffs' Petition for Award of Attorneys' Fees and Costs [42] in which plaintiffs seek an award of $86,471.00 in attorneys' fees and $1,710.94 for the costs incurred in litigating and settling this civil action. Defendants have opposed the amount sought, arguing that it is excessive and unreasonable. For the following reasons, the plaintiffs will be awarded $36,000.00 in attorneys' fees and $407.73 in costs.

I. Background

Plaintiffs Tanya Jackson, Michael Agyeman, Thomas George, Isaac Asare, Sharon Doss, and Courtney Collins brought this action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, to recover overtime wages owed to them by the defendants, Estelle Place LLC, Jireh Place LLC, Our Place LLC, Destiny Place LLC, Debra Roundtree, and

Mary Bell. Defendants are providers of group home services to disabled persons. Although each group home was managed by a different limited liability corporation, for the purposes of settling this litigation, the defendants agreed to include all of the hours worked by the plaintiffs for the various defendants in determining appropriate compensation under the FLSA. Defendants also agreed to characterize one plaintiff, Agyeman, as an exempt employee to whom overtime wages were due.

The Complaint, which also included claims of breach of contract and *quantum meruit,* was filed on September 22, 2008. Defendants did not file a motion to dismiss. On December 5, 2008, plaintiffs filed a Motion to Allow Notice to Similarly Situated Employees, which the defendants opposed. After the Court granted the plaintiffs' motion on December 19, 2008, the parties requested a stay of the proceedings while they negotiated a settlement of the claims. The parties reached a confidential settlement before any extensive discovery or motions practice had to been conducted. The settlement resolved the plaintiffs' FLSA claims, except for the issue of attorneys' fees and costs, which the parties agreed to submit to the Court. The settlement was approved on February 23, 2009.

II. Discussion

Pursuant to the FLSA, a prevailing party is entitled to an award of reasonable attorneys' fees and

costs. *See* 29 U.S.C. § 216(b). Because the parties have agreed that plaintiffs are the prevailing parties under 29 U.S.C. § 216(b), the plaintiffs are entitled to an award of reasonable attorneys' fees and costs. However, plaintiffs bear the burden of establishing that the fees and costs they seek are reasonable. *See Plyler v. Evatt,* 902 F.2d 273, 277 (4th Cir .1990).

In arriving at a reasonable attorneys' fee, the Court first must determine the lodestar figure by multiplying the number of reasonable hours expended times a reasonable hourly rate. *See Robinson v. Equifax Info. Servs.*, 560 F.3d 235, 243 (4th Cir.2009). In determining the number of reasonable hours expended and a reasonable hourly rate, the Court considers the twelve factors set out in *Barber v. Kimbrell's Inc. Id.*; *see also Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir.1978). These *Kimbrell* factors are:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and

> length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

577 F.2d at 226 n. 28. After deducting any fees that resulted from time spent on unsuccessful claims, the Court evaluates the "degree of success enjoyed by the plaintiff" and arrives at a final reasonable fee. *See Grissom v. The Mills Corp.*, 549 F.3d 313, 321 (4th Cir.2008) (internal quotations and citations omitted).

A. Reasonable Hourly Rate

Plaintiffs were represented in this lawsuit by The Employment Law Group, P.C. of Washington, DC and seek an award of attorneys' fees for 362.3 hours of work performed by two principals, an associate, a legal assistant, and a private investigator. The hourly rates billed were: $410 for principals Nicholas Woodfield and Robert Scott Oswald, attorneys who each have between 11 and 19 years of experience, $225 for an associate with 1 to 3 years of experience, and $130 for work performed by a legal assistant and a private investigator. In total, plaintiffs seek $86,471.00 in attorneys' fees.

Plaintiffs have the burden of proving that the hourly rate sought by each of their attorneys is reasonable. *See Robinson,* 560 F.3d at 243-45. To meet this burden, plaintiffs must provide not only affidavits of their own attorneys, but also "specific evidence of the prevailing market rates in the relevant

community for the type of work for which [they] seek[ ] an award." *Id.* (quoting *Plyler,* 902 F.2d at 277).

Plaintiffs support their contention that the hourly rates they seek are consistent with the prevailing market rates in this district with the affidavits of Mr. Woodfield and two well-respected employment lawyers who practice in the Eastern District of Virginia, Patricia Smith and Elaine Charlson Bredehoft. Both Ms. Smith and Ms. Bredehoft stated that they believed The Employment Law Group, P.C. was charging the prevailing market rate for lawyers with the same amount of experience as Mr. Woodfield and Mr. Oswald. However, both of those affidavits, as well of that of Mr. Woodfield, consistently refer to and rely upon the *Laffey* Matrix, which the Fourth Circuit has held is not sufficient evidence of the prevailing rates in Northern Virginia. *See Grissom,* 549 F.3d at 323.

In response, the defendants argue that the rates charged by The Employment Law Group exceed the prevailing market rate in the Eastern District of Virginia. This argument is meritorious. The defendants correctly contend that the *Laffey* Matrix, which was developed in the District of Columbia, does not accurately reflect the prevailing rates in Northern Virginia, where this case was litigated. *See Grissom,* 549 F.3d at 323. Defendants also provide the affidavits of Edward Rosenthal, lead defense counsel, and Edward Lee Isler, an extremely experienced Northern Virginia employment lawyer, both of which provide

strong support for the conclusion that prevailing hourly rates in this district are significantly less than the hourly rates plaintiffs' counsel charged in this civil action. Of particular significance is the hourly rate generally charged by lead defense counsel Edward Rosenthal, founder and managing partner of Rich Rosenthal Manitta Dzubin & Kroeger, LLP, a law firm which plaintiffs' counsel twice recognized as "one of the preeminent law firms" in the Eastern District of Virginia. *See* Mem. in Supp. of Plfs.' Pet. 11, 15. Mr. Rosenthal, who has more years of experience than either Mr. Woodfield and Mr. Oswald, avers that he regularly charges $375 per hour, although he reduced that rate to $325 per hour for this case. He also avers that, in his experience, attorneys in the Eastern District of Virginia with experience and competence equivalent to that of Mr. Woodfield and Mr. Oswald charge between $275 and $350 per hour for similar cases, associates with one to three years of experience are normally billed at $165 to $195 an hour, and legal assistants are usually billed at between $50 and $80 an hour. In fact, Mr. Rosenthal's law firm bills legal assistants at $55 an hour.

After carefully reviewing the submissions of the parties, the Court finds that the rates requested by the plaintiffs do not reflect the prevailing market rates in the Eastern District of Virginia. As the Fourth Circuit has recently noted, the *Laffey* Matrix does not control in the Eastern District of Virginia, and plaintiffs have not met their burden of showing "that the *Laffey* Matrix . . . is a reliable indicator of

the hourly rates of litigation attorneys in [Alexandria], Virginia. . . ." *See Robinson,* 560 F.3d at 245 (quoting *Grissom,* 549 F.3d at 323). Moreover, courts in this district have repeatedly recognized that hourly rates charged in Washington, D.C. are usually higher than hourly rates charged in the Eastern District of Virginia. *See, e.g., Am. Canoe Ass'n v. EPA,* 138 F.Supp.2d 722, 740-42 (E.D.Va.2001). Furthermore, the affidavits provided by the plaintiffs conflict with the affidavits provided by the defendants as to what constitutes the prevailing market rates for experienced attorneys, associates, and legal assistants in this district. For these reasons, the Court finds that the hourly rates suggested by the defendants more accurately reflect the prevailing market rates in Northern Virginia and will reduce the hourly rate to $350 to [sic] for Mr. Woodfield and Mr. Oswald, $170 for the associate, and $60 for the legal assistant. The Court will not award any fees for the private investigator.[1]

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[1] Although the defendants did not dispute the hourly rate for the private investigator, the Court has not determined what hourly rate is reasonable because this entire fee is unreasonable. Given the broad discovery tools available in civil litigation, the need for an investigator is highly questionable and in this Court's experience has not been sought by a civil litigant in a fee petition.

B. Reasonable Number of Hours Expended

Plaintiffs seek reimbursement for a total of 362.3 hours expended by the attorneys and staff of The Employment Law Group, P.C. This figure is compromised [sic] of 123.9 hours of work performed by Mr. Woodfield, 11.5 hours performed by Mr. Oswald, 16.3 hours performed by associate Katie Araus, 91.9 hours performed by a legal assistant, and 106.0 hours performed by a private investigator. Plaintiffs have also requested reimbursement for a sum of 9.1 hours billed by unidentified persons with the initials AAC, DLS, and JMZ.[2]

Defendants argue that the hours expended on this litigation were excessive considering the type and size of plaintiffs' claims and ask that these hours be significantly reduced because they were unnecessary and unwarranted. The defendants contend that plaintiffs should have sought an early settlement given the modest monetary claims at issue. They also object to the number of hours that plaintiffs incurred early in the litigation by preparing discovery requests even before an initial pretrial conference was held, and they also specifically challenge seven categories of fees as unreasonable, unnecessary, or unrelated to the successful claims. These categories include

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[2] The award will not include the hours billed by these three individuals because the plaintiffs did not provide any information about the qualifications or experience of these individuals, and, therefore, the Court is unable to determine a reasonable hourly rate for these individuals.

charges for: 1) work performed to evaluate the claims before plaintiffs' counsel agreed to be retained, 2) background checks run on plaintiffs and defendants, 3) legal research into retaliation issues, which were not alleged in the Complaint, 4) other research unrelated to the FLSA claims, 5) case evaluation meetings, 6) time spent on efforts to recruit other potential plaintiffs, who did not join the lawsuit, and 7) work that appears duplicative or lacks sufficient description to evaluate its relevance to the civil action.

Hours that are excessive, redundant, or unnecessary should not be included in a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). In addition, "hours that are not properly billed to one's *client* are . . . not properly billed to one's *adversary* pursuant to statutory authority." *Id.* Furthermore, fees should not be awarded for hours that are duplicative or where it is unclear why the hours were expended.

The defendants' seven specific objections have merit. First, the fees charged for running background checks on the parties and performing additional research on the defendants were unnecessary to litigate the FLSA claims, and, thus, were not reasonably expended. Second, the fees related to the case evaluation meeting on July 18, 2008 were also unnecessary and redundant. At this meeting, six attorneys billed 1.5 hours each "to evaluate the merits" of the plaintiffs' claims. These relatively straightforward FLSA claims did not require such a meeting or the hours spent preparing for it. Third, the fees related to

The Employment Law Group's examination of the plaintiffs' claims before the Group was retained will not be included because a private client would not be charged for those expenses. *See Hensley,* 461 U.S. at 433-34. Finally, fees that the attorneys billed for time spent researching a retaliation claim and trying to recruit other plaintiffs will not be awarded because no retaliation claim was alleged in the Complaint and additional plaintiffs did not join the lawsuit. These reductions reduce the total number of hours reasonably expended from 123.9 to 109.7 hours for Mr. Woodfield, from 11.5 to 7.9 hours for Mr. Oswald, from 16.3 to 7.4 hours for the associate, and from 91.9 to 89.7 hours for the legal assistant. The hours expended by the three unidentified individuals will not be awarded.

Only one of the *Kimbrell* factors, "the amount involved and the results obtained," requires further adjustment of the fee. The time and labor expended, the skill required to properly perform the legal services, the customary fee for like work, and the experience, reputation, and ability of the attorney are all adequately accounted for in the hourly rate and hours awarded to plaintiffs. Plaintiffs' attorneys have significant experience litigating employment law cases, but this civil action did not present particularly challenging legal or factual questions. Moreover, nothing about the relatively straightforward FLSA claims presented by plaintiffs and the litigation before this Court requires further adjustment based on the attorneys' opportunity costs, the attorneys' expectations at the outset of litigation, time limitations

imposed, or the undesirability of the case within the legal community. Finally, neither plaintiffs' attorneys' one time representation of the plaintiffs nor attorneys' fee awards in similar cases support increasing or decreasing the award.[3]

Lastly, the Court has considered the amount involved and the results obtained in evaluating the reasonableness of the fees. *See Farrar v. Hobby,* 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) ("'[T]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'"). In the end, only six plaintiffs joined this lawsuit and their total recovery was less than $10,000 before being doubled under the liquidated damage provision of the FLSA. Moreover, of the six awards, four were for less than $1,000 before doubling as plaintiff Agyeman received the largest recovery because of the misclassification. An attorneys' fee should bear some reasonable relationship to the recovery of plaintiffs. Given the modest value of the plaintiffs' claims, the Court will further reduce to the lodestar figure by approximately 25 percent to $36,000.00.

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[3] Plaintiffs cite to attorneys' fee awards they received in two other FLSA actions in this district to support their Petition. However, plaintiffs do not provide any information about the nature of those claims or the amount of discovery or motions practice conducted in those actions. Therefore, it is impossible for the Court to satisfactorily compare those awards with the award in this case.

For these reasons, the Court determines that a lodestar figure of $36,000.00 is reasonable. It is unnecessary to subtract fees incurred for unsuccessful, unrelated claims or to award only a percentage of this amount because plaintiffs settled all of their claims for full value. *Cf. Johnson v. City of Aiken,* 549 F.3d 333, 337 (4th Cir.2002).

C. Costs

Finally, the plaintiffs request that they be awarded $1,710.94 in costs. The defendants oppose $1,303.21 of these costs, arguing that these expenditures resulted from unnecessary background checks, legal research on the retaliation claim that was not alleged, meal expenses for meetings with potential plaintiffs who did not join the lawsuit, and mileage for unnecessary meetings with clients. All of the defendants' objections have merit. These expenses were either unrelated to or unnecessary for the successful claims. For these reasons, only $407.73 will be awarded.

D. Financial Position of the Defendants

In their Memorandum in Response to Plaintiffs' Petition, the defendants raised the issue of the defendants' financial position and observed that the attorneys' fees requested "threaten[ ] to bankrupt these Defendants." Mem. in Resp. 21. Although the defendants' memorandum did not specifically request a reduction of the award based on the defendants'

inability to pay, the letters attached as exhibits included the defendants' financial information and asked the Court for leniency or to consider their circumstances. The financial position of the defendants is not one of the factors to be considered in arriving at a reasonable attorneys' fee. *See, e.g., Grissom,* 549 P.3d at 321. Accordingly, the fee will not be further reduced.

III. Conclusion

For all these reasons, the Court finds that a total award of $36,000.00 in attorneys' fees and $407.73 in costs is reasonable and will be awarded by an Order to be issued with this Memorandum Opinion.

Filed: September 7, 2010

United States Court of Appeals,
For The Fourth Circuit

No. 09-1700
(1:08-cv-00984-LMB-TRJ)

Tanya JACKSON; Michael Agyeman; Thomas George; Isaac Asave, on behalf of themselves and on behalf of all others similarly situated

Plaintiffs-Appellants

v.

ESTELLE'S PLACE, LLC; Jireh Place, LLC; Our Place, LLC; Destiny Place, LLC; Debra Roundtree; Mary Bell

Defendants-Appellees

Metropolitan Washington Employment Lawyers Association; Washington Lawyers' Committee for Civil Rights and Urban Affairs

Amici Supporting Appellants.

ORDER

The Court grants the motion of the Public Justice Center to join in the filing of an amicus brief, as well as the joint motion to file an amicus brief in support of the petition for rehearing.

A majority of the panel has denied rehearing; Judge Gregory would grant panel rehearing. As for the motion for rehearing en banc, no member of the Court has requested a poll. Judge Gregory would vote to rehear the case en banc, but he does not request a poll of the Court.

Entered at the direction of the panel: Judge Gregory, Judge Agee and Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

STATUTE INVOLVED

Section 216(b) of 29 U.S.C. provides in pertinent part:

Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

179 (2)

No. 10-763

Supreme Court, U.S.
FILED
JAN 7 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TANYA JACKSON, *ET AL.*,
Petitioners,

v.

ESTELLE'S PLACE, LLC, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, THE PUBLIC JUSTICE CENTER, THE D.C. EMPLOYMENT JUSTICE CENTER, AND THE NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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January 7, 2011

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INTEREST OF *AMICI CURIAE*[1]

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("The Committee") is a non-profit civil rights organization established to eradicate discrimination by enforcing civil rights laws through litigation. In furtherance of this mission, the Committee represents victims of wage and hour violations in individual, class, and collective actions. From these cases, the Committee has amassed expertise in issues arising under the Fair Labor Standards Act ("FLSA"), as well as in awards of attorney's fees to prevailing plaintiffs in civil rights cases generally. The Committee also frequently litigates within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, and thus has substantial familiarity with Fourth Circuit jurisprudence on fee-shifting issues. The Committee was an amicus in earlier stages of the present case.

The Public Justice Center ("PJC"), a non-profit civil rights and anti-poverty legal services' organization, has a longstanding commitment to promoting the rights of low-wage workers. To that end, the PJC has represented thousands of employees seeking to recover unpaid wages from

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[1] No counsel for a party authored or made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have received timely notice of the intent to file this brief and have consented to its filing. The letters of consent have been filed with the Clerk.

their employers through collective and/or class actions under the FLSA and state wage and hour laws, and has also filed *amicus curiae* briefs in cases involving the rights of low-wage workers to collect unpaid wages and attorney's fees under the FLSA.

The D.C. Employment Justice Center ("EJC") is a non-profit organization whose mission is to secure, protect and promote workplace justice in the D.C. metropolitan area. The EJC uses a combination of legal services, advocacy and education, focusing its efforts on low-income workers. Since its founding, the EJC has provided employment law advice and assistance to over 8,000 workers at its free, walk-in legal clinic and has returned more than $5.5 million in wrongfully withheld wages and damages to low-income workers in the D.C. metro area. The EJC addresses the full range of employment law problems faced by low-wage workers, but the failure to pay workers in accordance with the law continues to be the most prevalent problem it sees.

The National Employment Law Project ("NELP") is a non-profit organization that advocates on behalf of low income and unemployed workers. NELP has a long-standing commitment to the enforcement of federal and state wage and hour laws, and has not only represented large collective actions of workers in FLSA cases, but has also provided technical assistance and litigation support to actions across the country that seek to vindicate workers' rights to be paid the wages they are entitled to under the law.

Amici address the significant consequences for low-wage workers of the Fourth Circuit Court of Appeals' holding that trial courts may reduce

attorney's fee awards for prevailing plaintiffs in FLSA cases solely because the damages recovered by the plaintiffs are modest. *Amici* predict that if the Fourth Circuit's holding is allowed to stand, low-wage workers will be left without representation, as private attorneys will be deterred from litigating meritorious FLSA claims. *Amici* thus urge the Court to grant petitioner's Petition.

SUMMARY OF ARGUMENT

Section 216 of the Fair Labor Standards Act ("FLSA") requires courts to award "a reasonable attorney's fee" to a prevailing plaintiff. This case raises two important questions as to when courts may award a prevailing FLSA plaintiff less than the lodestar fee: *first*, whether a court may reduce a prevailing FLSA plaintiff's attorney's fee award based on the "modest" amount of damages recovered by the plaintiff; and *second*, whether a court may reduce a prevailing FLSA plaintiff's award because he or she did not prevail on all of the alternative, non-FLSA legal theories asserted in the complaint. As the Petition demonstrates, the courts of appeals are sharply split on both questions.

In this brief, *amici* address the consequences of leaving in place the Fourth Circuit Court of Appeals' holding that a trial judge may reduce a statutorily mandated attorney's fee award based on the amount of monetary relief obtained by a prevailing plaintiff. *Amici* anticipate that permitting trial courts to consider the size of the monetary award when setting counsel's fees will have a dramatic effect on low-wage workers' ability to seek legal redress for violations of their civil rights, because many low-wage workers

seek damages that, though substantial to them, might otherwise seem "modest."[2]

FLSA claimants who achieve complete success in vindicating the civil rights abuses of their employers often recover less than $1000 in lost wages. According to the Department of Labor, the average FLSA claim in 2008 was for $712. This modest amount is several times larger than the average back wages owed to victims of FLSA violations in certain low-wage industries plagued by wage theft. For example, in the fast food industry, victims of FLSA violations are owed an average of $178 in back wages. As a result, a rule permitting a court to set attorney's fees based on the size of the prevailing plaintiff's damage award will devastate low-wage workers' ability to retain competent counsel.

Imposing additional barriers to low-wage workers' ability to bring private FLSA actions is especially troubling in light of the increasingly critical role that private enforcement plays in protecting against civil rights abuses. Wage theft is a pervasive problem, affecting more than one million workers each week in Chicago, Los Angeles, and New York alone. And, at the same time that low-wage workers have experienced a sharp rise in wage theft, the Department of Labor's Wage and Hour Division's

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[2] Though it is not the focus of this brief, *Amici* agree with petitioner that it is likewise improper for a trial court to reduce an otherwise reasonable attorney's fee award based on the plaintiff's failure to prevail on other claims providing additional remedies. *See* Pet. at 35-36.

enforcement of the FLSA's minimum wage and overtime provisions has become less effective, leaving low-wage workers more vulnerable to wage theft. As a result, low-wage workers increasingly must rely on private causes of action to vindicate violations of their labor rights. It is therefore essential to ensure that these victims can continue to procure competent counsel through attorney's fee awards that are commensurate with the time and effort required to litigate FLSA actions – time and effort that is essentially the same whether the claim is for $100 or for $100,000.

ARGUMENT

I. FEE-SHIFTING STATUTES ENABLE INDIVIDUALS WHO CANNOT AFFORD COUNSEL TO OBTAIN CAPABLE REPRESENTATION TO PROTECT CIVIL RIGHTS.

Though the "American Rule" provides that each party to a lawsuit must pay his or her own counsel fees, this Court has long recognized Congress's power to abrogate this rule to permit prevailing plaintiffs to recover their legal fees from their opponents. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Congress has repeatedly determined that an exception to the American Rule is both necessary and appropriate "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1588, at 1 (1976)); *see also id.* at 444 (Brennan, J., concurring in part and dissenting in part) (fee-shifting statutes serve "the need to ensure

that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them").

In fact, Congress has enacted over 100 different statutes that provide a prevailing plaintiff with attorney's fees in a variety of causes of action. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986), *supplemented by*, 483 U.S. 711 (1987). These fee-shifting statutes are especially prevalent in the civil rights context, because Congress has recognized that under the American Rule, several factors operate to impede civil rights litigants' ability to procure representation to vindicate their rights. For example, Congress "found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process," because "[t]hese victims ordinarily cannot afford to purchase legal services at the rates set by the private market." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (plurality) (citing H.R. Rep. No. 94-1558, at 3 (1976)). Compounding this problem are various "immunity doctrines and special defenses, available only to public officials," that "preclude or severely limit the damage remedy" available to civil rights litigants. *Id.* at 577 (quoting H.R. Rep. No. 94-1558, at 9). Indeed, often times, victims of federal and constitutional violations seek little to no monetary relief at all. Therefore, counsel may be reluctant or unable to accept important civil rights cases given the real risks of nonpayment for hours, weeks, months, and even years of service.

Yet despite the modest monetary recovery these cases bestow upon prevailing plaintiffs, they

play a critical role in protecting against violations of constitutional and statutory rights and have consequences far beyond both their remunerative value and the benefits provided to any one individual plaintiff. Indeed, Congress recognized the fundamental role private citizens play in protecting federal rights more generally and the need to ensure that private enforcement remains a viable avenue to vindicate civil rights for the benefit of the public. *Hensley*, 461 U.S. at 445 (Brennan, J., concurring in part and dissenting in part) ("[a]ll of these civil rights laws depend heavily upon private enforcement") (quoting S. Rep. No. 94-1011, at 2, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910).

Accordingly, fee-shifting statutes ensure that those seeking to protect important federal and constitutional rights can obtain counsel to pursue these claims on their behalf. This legislation is designed to "enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible to do so," as Congress recognized that "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *Rivera*, 477 U.S. at 578 (plurality) (quoting S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5910)). Requiring payment of a prevailing plaintiff's attorney's fees "guarantee[s] reasonable payment for the time and effort expended" on successful claims.

Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 483 U.S. 711, 726 (1987).

Toward these ends, fee-shifting statutes aim to provide counsel for civil rights plaintiffs a reasonable attorney's fee, i.e., "one that is adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (internal quotation marks omitted) (alterations in original). The fee award must be "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010). This Court has consistently found that the lodestar figure – calculated by multiplying the number of hours reasonably spent on the matter by a reasonable billing rate – "yields a fee that is presumptively sufficient to achieve this objective." *Id.* at 1673. Trial courts ordinarily should not alter the lodestar fee since calculation of the lodestar "includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee." *Id.* (internal quotation marks omitted).

II. ATTORNEY'S FEES AWARDS ARE CRITICAL TO ENSURE PRIVATE ENFORCEMENT OF RIGHTS UNDER THE FAIR LABOR STANDARDS ACT.

A. The Purpose of the FLSA and its Fee-Shifting Mechanism

In 1938, Congress enacted the Fair Labor Standards Act ("FLSA") "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best*

Freight Sys., Inc., 450 U.S. 728, 739 (1981). Concluding that both underpay and overwork were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers," *see* 29 U.S.C. § 202(a), the FLSA aims to provide "specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine*, 450 U.S. at 739 (alteration and emphasis in original) (internal quotation marks omitted).

Indeed, as the congressional record reflects, the statute was designed "to aid the unprotected, unorganized and lowest paid of the nation's working population." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (citing 81 Cong. Rec. 7652, 7672, 7885; 82 Cong. Rec. 1386, 1395, 1491, 1507; 83 Cong. Rec. 7283, 7298, 9260, 9265; H. Rep. No. 75-1452, at 9 (1937); S. Rep. No. 75-884, at 3, 4 (1937)). As a result, most FLSA plaintiffs cannot afford to hire a lawyer to vindicate violations of the statute. And even when successful, FLSA plaintiffs rarely recover sufficient damages to pay counsel fees. According to the United States Department of Labor, in 2008, the average amount of back pay recovered by a prevailing FLSA claimant was $712. *See* U.S. Dept. of Labor, Wage and Hour Division, 2008 Statistics Fact Sheet, at http://www.dol.gov/whd/statistics/2008FiscalYear.htm [hereinafter *2008 Fact Sheet*] (noting that for fiscal year 2008, "more than 197,000 employees received a total of $140.2 million in

minimum wage and overtime back wages as a result of Fair Labor Standards Act (FLSA) violations").

To ensure that these low-wage workers can access the judicial process to vindicate violations of their rights under the FLSA, Congress included within the statute a fee-shifting mechanism whereby prevailing plaintiffs are entitled to recover reasonable attorney's fees. *See* 29 U.S.C. § 216(b); *see also Fegley v. Higgins*, 19 F.3d 1126, 1134-35 (6th Cir. 1994). The award of attorney's fees to a prevailing FLSA plaintiff is mandatory. *See* 29 U.S.C. § 216(b). Allowing recovery for prevailing FLSA plaintiffs' legal fees enables private citizens to retain capable counsel to prosecute violations of their rights without risking financial hardship to themselves. Shifting a prevailing plaintiff's legal fees to his or her opponent helps ensure private enforcement of FLSA grievances. *See Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 952 (E.D. Wis. 2003), *aff'd*, 93 F. App'x 81 (7th Cir. 2004); *cf Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426 (2d Cir. 1999) ("Congress enacted fee-shifting in civil rights litigation precisely because the expected monetary recovery in many cases was too small to attract effective legal representation."). By including a fee-shifting provision in the FLSA, Congress sought to enable recovery for victims of FLSA violations for the full amount of back pay or overtime to which they are entitled, plus penalties, without having to then spend this money to cover the legal fees. *See Maddrix v. Dize*, 153 F.2d 274, 275-76 (4th Cir. 1946).

B. The Increasing Need for FLSA Enforcement

Every week, millions of low-wage workers across the country are cheated out of a significant portion of their pay. A 2008 survey conducted by *Amicus* National Employment Law Project ("NELP") revealed that more than one-fourth of the 4,387 low-wage workers surveyed in Chicago, Los Angeles and New York had been paid less than the minimum wage in the previous week, while more than three-quarters of those workers entitled to overtime pay had not received it. Annette Bernhardt et al., *Broken Laws, Unprotected Workers* 2 (2009) [hereinafter *Broken Laws*]. The average worker surveyed earns just $339 a week and had been cheated out of $51, or roughly 15% of his wages, the previous week. *Id.* at 5. According to NELP estimates, employers for over one million workers unlawfully cheat their employees out of more than $56.4 million in wages *each week* in Chicago, Los Angles, and New York alone. *Id.* at 6.

Indeed, over the past several years, the number of FLSA violations has grown dramatically. In 2008, Department of Labor investigators investigated the employers of approximately 77,000 low-wage workers and determined that these workers were owed $57.5 million in earned minimum wage and overtime back wages by their employers – a 77% increase over the amount of back wages WHD investigators determined that investigated employers owed to

workers in low-wage industries in 2001.[3] 2008 Fact Sheet at 3.

In some low-wage industries, non-compliance with the FLSA has become standard industry practice. The restaurant, retail, manufacturing, health care, and construction industries—which collectively provide an estimated 58% of all low-wage jobs—are among the worst offenders. David Weil, *Improving Workplace Conditions Through Strategic Enforcement* 8 (2010) [hereinafter *Strategic Enforcement*]. Study after study has found shocking levels of non-compliance in these industries.[4] Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and*

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[3] This number grossly underestimates the amount of back wages and overtime pay owed to low-wage workers, as it is based only on those cases WHD decided to investigate—a number that reflects only a small fraction of the millions of FLSA violations that occur each year. *See infra* Section II.C.

[4] *See, e.g.*, Restaurant Opportunities Center of New York & New York City Restaurant Industry Coalition, *Behind the Kitchen Door* 14 (2005) (13% of New York City restaurant workers are paid less than minimum wage and 59% were are not properly paid overtime); *see also* U.S. Dep't of Labor, *Nursing Home Compliance Fact Sheet* (2000) (60% of nursing homes are not complaint with the FLSA); Lonnie Golden & Helene Jorgensen, Economic Policy Institute, *Time After Time: Mandatory Overtime in the U.S. Economy* (2002), at 7 (27% of contract construction employees are not properly paid overtime); U.S. Dep't of Labor, *Poultry Processing Compliance Survey Fact Sheet* (2001) (100% of 51 investigated poultry plants are noncompliant with FLSA).

the Underenforcement of the Minimum Labor Standards, 92 Minn. L. Rev. 1317, 1318 (2007) ("Numerous investigations have documented shocking levels of noncompliance with the minimum standards established in the FLSA, particularly in low-wage industries such as the janitorial, food service, garment, and hospitality industries.") For example, NELP found that 40% of the sewing and garment workers it surveyed were paid less than minimum wage and 70% were not properly paid overtime. *Broken Laws* at 39; *see also, e.g.*, U.S. Dep't of Labor, *Close to Half of Garment Contractors Violating Fair Labor Standards Act,* BNA Daily Labor Report (May 6, 1996), *available in* Westlaw 1996 DLR 87; U.S. Dep't of Labor, WHD Press Release: *U.S. Department of Labor obtains default judgment in Southern California garment manufacturer case*, Dec. 14, 2010, *available at* http://www.dol.gov/opa/media/press/whd/whd20101694.htm.

Within particular industries, noncompliance with the FLSA disproportionately impacts minority workers. Studies have shown that women are significantly more likely than men to be cheated out of wages and employers are three times more likely to unlawfully withhold wages from African-American workers than from white workers. *Broken Laws* at 5.

As these statistics demonstrate, the nation is currently facing "a crisis of wage theft." Kim Bobo, *Wage Theft in America* 117 (2009). The Employer Policy Foundation, an employer-supported think tank, estimates that workers would receive an

additional $19 *billion* each year if all employers complied with the FLSA's overtime provision. Craig Becker, *A Good Job for Everyone*, Legal Times, Sept. 6, 2004, at 54. Absent intervention, this crisis will only worsen. When cheating workers out of their earned wages becomes standard practice within an industry, honest employers are unfairly disadvantaged and suffer competitive harm. As a result, they face intense economic pressure to level the playing field by underpaying their workers. Given the scale of the crisis of wage theft facing the nation's workers, and the likelihood that this crisis will worsen absent intervention, there is an urgent need to vindicate violations of the FLSA and to hold employers accountable for the unlawful wage theft.

C. Private Enforcement of the FLSA is Critical

At the same time that theft of low-wage workers' wages and over-time pay has become increasingly prevalent, the government resources devoted to the enforcement of the FLSA have diminished. As of 2008, the Department of Labor's Wage and Hour Division ("WHD")—the division responsible for enforcing the FLSA and other labor laws[5]—had just

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[5] The WHD also enforces government contracts labor standards statutes, the Migrant and Seasonal Agricultural Worker Protection Act, the Employee Polygraph Protection Act, the Family and Medical Leave Act, and certain provision of the Immigration Reform and Control Act of 1986. U.S. Dep't of Labor, Wage and Hour Division Mission Statement, http://www.dol.gov/whd/about/mission/whdmiss.htm; *see also generally* Bobo at 7-15.

750 investigators and is responsible for protecting more than 130 million full- and part-time workers in approximately 7 million workplaces. Bobo, *supra*, at 116-17. Put differently, the WHD had just one investigator for every 170,000 workers and 9,000 workplaces. *Id.*

Indeed, as the labor market has grown, the number of investigators devoted to the enforcement of the FLSA's minimum wage and overtime provisions and the number of investigations handled by each investigator has fallen, rather than increased.[6] In the last three decades, the labor force grew by 52%, but the number of WHD inspectors enforcing federal minimum wage and overtime laws fell by 31%. *Broken Laws* at 52; *see also Strategic Enforcement,* at 6. And, in the last decade, the number of investigations handled by each investigator plummeted. In 1998, the average investigator conducted 52.6 investigations; in contrast, in 2008, the average investigator conducted just 31.5 investigations. *Strategic Enforcement,* at 7. Overall, the WHD conducted 49,521 investigations in 1998 and a mere 23,043 investigations in 2008. *Id.*

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[6] Annette Bernhardt and Siobhán McGrath calculate that between 1975 and 2004 the number of WHD investigators dropped 14%, the number of investigations dropped 36%, and the number of workers paid back wages dropped 24%. Annette Bernhardt & Siobhán McGrath, Brennan Center for Justice, *Trends in Wage and Hour Enforcement in the U.S. Department of Labor, 1975-2004*, 1 (2005). During the same period, the labor force grew by 55% and the number of workplaces grew by 112%. *Id.*

Because of the inadequate resources devoted to public enforcement, the federal government's efforts to enforce the FLSA do little to discourage employers from flouting the FLSA's minimum wage and overtime provisions. Given the limited number of investigators handling such cases, the odds are low that the WHD will investigate even large employers who are likely to be noncompliant with the FLSA's standards. For example, the twenty largest fast food restaurant chains in the United States face a mere 0.008 likelihood that they will be investigated by the WHD in any given year. *Id.*, at 6, 51. And the likelihood that a garden-variety workplace will be investigated is even lower: one study estimates that the probability of an investigation in the average workplace is well below 0.001. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Underenforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 62 (2005).

Moreover, even if a worker does file a complaint to the WHD, there is no guarantee that it will investigate that complaint. In recent years, the WHD has launched fewer investigations in response to worker complaints. In 2008, the WHD conducted roughly half the number of investigations in response to worker complaints that it did a decade earlier. *Strategic Enforcement*, at 7. A 2009 Government Accountability Office investigation of the WHD reveals that the WHD's failure to respond adequately to worker complaints is the product not only of a lack of manpower, but also of systematic failures within the WHD. U.S. Gov't Accountability

Office, GAO-09-458T, *Wage and Hour Division's Complaint Intake Processes Leave Low Wage Workers Vulnerable to Wage Theft* (Mar. 25, 2009) [hereinafter *Intake Process*]. Of the ten fictional complaints filed by undercover GAO employees, the WHD successfully investigated only one. *Id.* at 4. The WHD's response was "sluggish," the intake process "ineffective," and, in one case, a WHD investigator lied about having investigated a complaint. *Id.* at 1. Moreover, the GAO identified at least 20 specific cases—affecting at least 1,160 real employees—that the WHD had inadequately investigated. The WHD took more than one year to respond to some complaints, closed cases based on unverified denials of employers, and dropped cases when employers did not return phone calls. *Id.* The GAO concluded that its "investigation clearly shows that the Department of Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn." *Id.* at 24.[7]

Compounding this problem is the fact that even if a worker's complaint is investigated and the WHD finds that the employee is entitled to back wages, the employee is unlikely to recover the wages owed to him if the employer decides not to pay him. When an employer fails to pay, the WHD refers the case to the

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[7] In response to the GAO's report, the Obama Administration has reportedly added 250 investigators to the WHD in January of 2010. Whether these efforts will address the WHD's manpower shortage and the systematic problems witnessed by GAO is yet to be seen.

Office of the Solicitor to collect on the debt. Like the WHD, the Office of the Solicitor has diminished in size over the past two decades, losing approximately one-fourth of its staff. *Strategic Enforcement*, at 90. This has had an enormous impact on the number of FLSA cases the Solicitor handles because the Solicitor has discretion as to whether to litigate a FLSA case. Lack of resources has led to few litigated cases. In fact, the number of FLSA lawsuits filed by the Solicitor's Office decreased at the same time that violations of the FLSA were on the rise, dropping from 705 in 1987 to 151 in 2007. *Id.*.

The Solicitor's Office's limited capacity to collect employer debts undermines the effectiveness of the WHD's limited enforcement of the FLSA. A 2007 case is illustrative. Masonry Structures, a construction company, had promised to pay eleven workers $13 per hour, but paid them nothing at all. In total, Masonry Structures owed these eleven workers more than $15,000. Six months after the violation was reported to the WHD, a WHD investigator informed the workers that Masonry Structures had agreed to pay. When Masonry reneged on its promise, the Solicitor's Office "considered" suing, but ultimately did nothing. Bobo, *supra*, at 171. Even though the WHD had determined that Masonry Structures had failed to pay these workers, they were no better off for having complained to the WHD, and the employer suffered no penalty for stealing wages and refusing to comply with WHD's determination.

Collectively, the lack of resources at the WHD and the Solicitor's Office and the resulting

unwillingness or inability to investigate and litigate meritorious FLSA complaints has dramatically reduced the federal government's ability to protect low-wage workers against pervasive wage and hour violations under the FLSA. In light of the federal government's failure to vindicate the rights of low-wage workers, "the private bar is carrying most of the burden before the courts." Bobo, *supra*, at 177. While the Solicitor's Office filed only 151 lawsuits in 2007, private attorneys filed over 7,000 that same year. In fact, individual WHD investigators have been known to advise complainants that filing a private suit is their best, or only, option. *See Id.* at 118; *Intake Processes* at 8-9. It is therefore clear that if the law on attorney's fee recovery renders the private bar unwilling to take on meritorious FLSA claims of low-wage workers, those workers will be left without a remedy. *See* Bobo, *supra*, at 177.

III. REDUCTION OF AN ATTORNEY'S FEE AWARD BASED ON THE SIZE OF PLAINTIFF'S RECOVERY WILL HURT LOW-WAGE WORKERS' ABILITY TO RETAIN COUNSEL TO VINDICATE THEIR RIGHTS UNDER THE FLSA

Because low-wage workers must increasingly rely on private enforcement of the FLSA, it is critical that they be able to attract and retain qualified counsel. Traditional fee arrangements do not work for most FLSA claimants, as low-wage workers generally cannot afford to pay an attorney by the hour, and most FLSA claimants' total damages are

insufficient to justify a standard contingent-fee arrangement.[8] For example, the average worker cheated out of wages by one of the top twenty fast food restaurant chains in the United States could recover just $178 in wages, plus liquidated damages, if completely successful in his FLSA claim. *Strategic Enforcement,* at 54. For a fast-food employee working 40 hours per week at the federal minimum wage, this seemingly modest damages award equals well over a week's pay—a significant recovery by most standards. Nevertheless, this amount clearly is insufficient to attract and retain a capable attorney to handle the case on contingency. Even the "simplest" FLSA case "if carried through trial, is likely to require at least ten thousand dollars worth of attorney time and in most cases the fees and costs incurred will be much higher." Becker & Strauss, *supra*, 92 Minn. L. Rev. at 1333.

For these reasons, attorneys representing low-wage workers in FLSA cases rely on the FLSA's fee-shifting mechanism to compensate them for their services in litigating meritorious claims. Indeed, given FLSA claimants' general inability to pay counsel, it is only the prospect of fee-shifting that

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[8] *Gentry v. Superior Court*, 165 P.3d 556, 564 (Cal. 2007) ("[I]ndividual awards in wage-and-hour cases tend to be modest. In addition to the fact that litigation over minimum wage by definition involves the lowest-wage workers, overtime litigation also usually involves workers at the lower end of the pay scale, since professional, executive, and administrative employees are generally exempt from overtime statutes and regulations.").

renders representation possible. The Fourth Circuit's holding in this case will significantly increase the risk that attorneys who achieve complete success on behalf of low-wage workers will not be paid the full lodestar. This, in turn, will make it more difficult for low-wage workers who have been cheated out of FLSA-mandated wages to retain private attorneys to help them recover the wages to which they are entitled, undermining the effectiveness of the FLSA's fee-shifting mechanism. The message the Fourth Circuit has sent to employers is that they face little risk of liability for cheating low-wage workers out of damages that, while significant to the worker, are of "modest value" in comparison to the average attorney's fee. *Jackson v. Estelle's Place, LLC*, No. 09-1700, 2010 U.S. App. LEXIS 16,856, at *7 (4th Cir. Aug. 12, 2010).

Even absent the Fourth Circuit's holding that a trial court may reduce an otherwise reasonable attorney's fee award based on the size of the recovery, attorneys representing low-wage FLSA claimants receive only a discounted fee for their services because the lodestar does not fully compensate attorneys who bring cases under fee-shifting statutes. Rather, when an attorney takes such a case he "assumes a risk of nonpayment" for which the lodestar will not compensate him. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 715 (1986); *see also City of Burlington v. Dague*, 505 U.S. 557, 569 (1992) (Blackmun, J., dissenting) ("In many cases brought under federal statutes that authorize fee shifting, plaintiffs will be unable to ensure that their

attorneys will be compensated for the risk that they might not prevail"). While the lodestar is calculated by multiplying the number of hours the attorney devoted to the case by the attorney's customary rate, the customary hourly rates generally reflect lawyers' expectations that they will be "paid promptly and without regard to success or failure." *Hensley*, 461 U.S. at 448 (Brennan, J., concurring in part and dissenting in part). Private attorneys who take cases on contingency, and therefore "tak[e] upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate." *Id.* The premium clients pay when their attorney takes their case on contingency "reflects...the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate." *Id.* at 448-49. Accordingly, "the expected return from cases brought under federal fee-shifting provisions will be less than could be obtained in otherwise comparable private litigation offering guaranteed, win-or-lose compensation." *City of Burlington*, 505 U.S. at 568-569 (Blackmun, J., dissenting). Given this economic reality, there is a danger that "[p]rudent counsel" will "avoid federal fee-bearing claims in favor of private litigation, even in the very situations for which the attorney's fee statutes were designed" and "even if the fee-bearing claim is more likely meritorious than the competing private claim." *Id.* at 569.

This Court has made clear that the lodestar is designed to be the "fee that is *sufficient* to induce a capable attorney to undertake the representation of

a meritorious...case." *Perdue*, 130 S. Ct. at 1672 (emphasis added). If courts have discretion to reduce a fee award on the grounds that "[a]n attorneys' fee should bear some reasonable relationship to the recovery," *Estelle's Place*, 2010 U.S. App. LEXIS 16856, at *7 (quotation marks omitted), the expected value of a low-wage worker's meritorious FLSA claim will no longer be sufficient to induce a capable attorney to represent him. Equally problematic, there is a risk that different district courts will have different views as to what constitutes a "modest value" warranting a reduction in an attorney's fee award.

Indeed, the Fourth Circuit's decision may lead to the emergence of two tiers of FLSA plaintiffs. The first tier, consisting of claimants owed tens of thousands of dollars or more in back wages, may be able to find a capable lawyer despite the Fourth Circuit's holding, while the second tier, consisting of claimants owed several thousand dollars or even less, may not. In other words, the very lowest paid workers – the precise group the FLSA was designed to protect, *see, e.g.*, *Brooklyn Sav. Bank*, 324 U.S. at 707 n.18 (the FLSA was designed to protect "the unprotected, unorganized and lowest paid of the nations' working population") – will be the first left without legal representation as a result of the Fourth Circuit's holding. This harsh result is inconsistent with the fundamental goal of the FLSA: to provide *all* individual workers with protection from overwork and underpay. *See Barrentine*, 450 U.S. at 739.

Making attorney's fee awards contingent on the monetary relief recovered by a plaintiff not only

undermines the very purpose of the fee-shifting mechanism contained in the FLSA, but it also makes no sense. The Fourth Circuit's holding assumes that attorneys representing low-wage workers with smaller claims of monetary damages do not deserve the same remuneration for their time as attorneys representing clients with larger claims. That is simply illogical. One hour of an attorney's time has the same inherent value whether the claim is for $100 or $10,000 in lost wages. An attorney litigating a FLSA claim for a client will perform essentially the same work regardless of the amount at stake. She will conduct the same type of factual investigation, wrestle with the same legal issues, file the same amount of motions, draft the same type of briefs, and prepare for trial in the same manner, without regard to the damages sought. A rule that permits a reduction of a fee award based on the amount of the damages recovered under the FLSA penalizes those lawyers who represent the lowest paid workers, and severely limits low-wage workers' ability to retain counsel. For these reasons, tying an attorney's recovery to the amount of damages sought is as illogical as it is unjust, and trial courts should not be permitted to reduce an otherwise reasonable attorney's fee award on this basis.

CONCLUSION

For these reasons and those set forth in the Petition, the Petition for Certiorari should be granted.

Respectfully Submitted,

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